NORTH CAROLINA COURT OF APPEALS REPORTS

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TABLE OF CONTENTS

Judges of the Court of Appeals v

Superior Court Judges vi

District Court Judges viii

Attorney General xii

District Attorneys xiii

Table of Cases Reported xiv

Cases Reported Without Published Opinion xx

General Statutes Cited and Construed xxii

Rules of Civil Procedure Cited and Construed xxiv

Dispositions of Petitions for Discretionary Review xxv

Disposition of Appeals of Right to Supreme Court xxviii

Opinions of the Court of Appeals 1-751

Amendment to Rules of Appellate Procedure 753

Analytical Index 757

Word and Phrase Index 788

THE COURT OF APPEALS
OF
NORTH CAROLINA

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WALTER E. BROCK

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EARL W. VAUGHN
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28	HARRY C. MARTIN	Asheville
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29	J. W. JACKSON	Hendersonville
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[1] Appointed 27 November 1976.
[2] Appointed 21 October 1976.
[3] Deceased 24 January 1977.

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	J. CHARLES McDARRIS	Waynesville
	JOHN J. SNOW, JR.[28]	Murphy

[1] Appointed Chief Judge 6 December 1976.
[2] Elected 2 November 1976 and took office 6 December 1976 to succeed J. W. H. Roberts who retired 5 December 1976.
[3] Elected 2 November 1976 and took office 6 December 1976.
[4] Appointed Chief Judge 1 December 1976.
[5] Elected 2 November 1976 and took office 6 December 1976 to succeed Paul M. Crumpler whose term expired 5 December 1976.
[6] Elected 2 November 1976 and took office 6 December 1976 to succeed Ballard S. Gay who retired 5 December 1976.
[7] Elected 2 November 1976 and took office 6 December 1976 to succeed Lester W. Pate whose term expired 5 December 1976.
[8] Appointed Chief Judge 6 December 1976.
[9] Elected 2 November 1976 and took office 6 December 1976 to succeed Julius Banzet who retired 5 December 1976.
[10] Elected 2 November 1976 and took office 6 December 1976.
[11] Elected 2 November 1976 and took office 6 December 1976 to succeed Carlos W. Murray, Jr. whose term expired 5 December 1976.
[12] Elected 2 November 1976 and took office 6 December 1976 to succeed William Lewis Sauls whose term expired 5 December 1976.
[13] Elected 2 November 1976 and took office 6 December 1976 to succeed Coleman Cates whose term expired 5 December 1976.
[14] Elected 2 November 1976 and took office 6 December 1976.
[15] Appointed Chief Judge 1 December 1976.
[16] Elected 2 November 1976 and took office 6 December 1976 to succeed E. D. Kuykendall, Jr. who retired 5 December 1976.
[17] Elected 2 November 1976 and took office 6 December 1976 to succeed Darl L. Fowler whose term expired 5 December 1976.
[18] Elected 2 November 1976 and took office 6 December 1976 to succeed Walter E. Clark, Jr. whose term expired 5 December 1976.
[19] Elected 2 November 1976 and took office 6 December 1976.
[20] Elected 2 November 1976 and took office 6 December 1976 to succeed A. A. Webb whose term expired 5 December 1976.
[21] Elected 2 November 1976 and took office 6 December 1976 to succeed Frank J. Yeager whose term expired 5 December 1976.
[22] Elected 2 November 1976 and took office 6 December 1976 to succeed John Clifford whose term expired 5 December 1976.
[23] Elected 2 November 1976 and took office 6 December 1976 to succeed A. Lincoln Sherk whose term expired 5 December 1976.
[24] Elected 2 November 1976 and took office 6 December 1976 to succeed J. Edward Stukes whose term expired 5 December 1976.
[25] Elected 2 November 1976 and took office 6 December 1976 to succeed Oscar F. Mason, Jr. whose term expired 5 December 1976.
[26] Elected 2 November 1976 and took office 6 December 1976 to succeed Wade B. Matheny who retired 5 December 1976.
[27] Elected 2 November 1976 and took office 5 December 1976 to succeed Ladson F. Hart whose term expired 5 December 1976.
[28] Elected 2 November 1976 and took office 6 December 1976.

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	PAGE
ABC Board, Fay v.	492
Alderman-250 Corp., Development Corp. v.	598
Alford v. Cab Co.	657
Allen, Supply, Inc. v.	272
Alligood v. Henning	126
AMC/Jeep, Inc., Whitten v.	161
Arnold v. Arnold	683
Ashe, S. v.	74
Association, Pulley v.	94
Assurance Co., Self v.	558
Attorney General, In re Investigation by	585
Attorney General v. Penney Co.	368
Attorney General, Utilities Comm. v.	459
Attorney General, Utilities Comm. v.	474
Attorney General, Utilities Comm. v.	475
Automobile Rate Office, Comr. of Insurance v.	427
Automobile Rate Office, Comr. of Insurance v.	477
Bailey, Parsons v.	497
Ball Photo Supply Co. v. McClain	132
Bank, Construction Co. v.	155
Bank v. Construction Co.	220
Bank v. Funding Corp.	172
Bank of Virginia-Central v. Construction Co.	220
Barnes v. Barnes	196
Barnes, S. v.	671
Basinger, S. v.	45
Basinger, Williamson v.	50
Beasley-Kelso Associates v. Tenney	708
Black v. Black	403
Board of Alcoholic Control, Fay v.	492
Board of Transportation, Guyton v.	87
Bob King's AMC/Jeep, Inc., Whitten v.	161
Boone v. Fuller	107
Bremson, Foy v.	662
Brice v. Moore	365
Bridge Co. v. Highway Comm.	535
Bridges, Trucks, Inc. v.	355
Broadwell Realty Corp. v. Coble, Sec. of Revenue	261
Brondum v. Cox	35
Bryson, S. v.	71
Budweiser of Asheville, Ponder v.	200
Burchfield, S. v.	128
Burrus, S. v.	250
Burwell v. Wilkerson	110
Cab Co., Alford v.	657
Campbell, S. v.	652
Cannady v. Wildlife Resources Comm.	247
Carl Rose & Sons Ready Mix Concrete v. Sales Corp.	526
Carolina Power and Light Co. v. Edmisten, Atty. General	475
Caroon v. Eubank	244
Carter, S. v.	59
Cartwright, Thornton v.	674
Cash, S. v.	677
Chandler, S. v.	646
Chavis, S. v.	75
Chester, S. v.	224
Cities Service Oil Co. v. Pochna	360
City of Durham Redevelopment Comm. v. Holman	395
City of High Point, Joyce v.	346
Clark, S. v.	253
Coan, Construction Co. v.	731
Coble, Sec. of Revenue, Realty Corp. v.	261
Coble, Sec. of Revenue, Stanback v.	533
Coffer v. Standard Brands	134
Combs v. Eller	30
Comr. of Insurance v. Automobile Rate Office	427
Comr. of Insurance v. Automobile Rate Office	477
Comr. of Insurance, Insurance Co. v.	741
Comr. of Insurance v. Rating Bureau	487
Comr. of Insurance v. Rating Bureau	549
Comr. of Insurance v. Rating and Inspection Bureau	332
Compensation Rating and In-	

	PAGE
spection Bureau of N. C., Comr. of Insurance v.	332
Construction Co. v. Bank	155
Construction Co., Bank v.	220
Construction Co. v. Coan	731
Construction Co. v. Gibson	385
Cottingham, S. v.	67
County of Harnett, Utilities Comm. v.	24
Cox, Brondum v.	35
Cox, S. v.	54
Critcher v. Ogburn	182
Culp, S. v.	398
Darnell v. Dept. of Transportation	328
Dept. of Transportation, Darnell v.	328
DeRose Industries, Inc., Inscoe v.	1
Development Corp. v. Alderman-250 Corp.	598
Drug Co., Rodd v.	564
Duke Power Co. v. Edmisten, Atty. General	459
Duke University, Giannitrapani v.	667
Duncan, S. v.	112
Dupree, S. v.	232
Durham Redevelopment Comm. v. Holman	395
Dyeing Machine Co., Shuler v.	577
East Coast Development Corp. v. Alderman-250 Corp.	598
Edmisten, Attorney General v. Penney Co.	368
Edmisten, Atty. General, Utilities Comm. v.	459
Edmisten, Atty. General, Utilities Comm. v.	474
Edmisten, Atty. General, Utilities Comm. v.	475
Eller, Combs v.	30
Eppley, S. v.	217
Equipment Co. v. Weant	191
Eubank, Caroon v.	244
Evans v. Stiles	317
Executive Leasing Associates v. Rowland	590
Fay v. Board of Alcoholic Control	492
Fire Insurance Rating Bureau, Comr. of Insurance v.	487
Fire Insurance Rating Bureau, Comr. of Insurance v.	549
First National Bank of Shelby v. Funding Corp.	172
Foremost Insurance Co. v. Ingram, Comr. of Insurance	741
Forsyth Memorial Hospital, Spillman v.	406
Fowler v. McLean	393
Foy v. Bremson	662
Freedle, S. v.	118
Frye, Townsend v.	634
Fuller, Boone v.	107
Funding Corp., Bank v.	172
Furniture, Inc., Gudger v.	387
Gallimore v. Marilyn's Shoes	628
Gardin, Lentz v.	379
Gaston County Dyeing Machine Co., Shuler v.	577
General Funding Corp., Bank v.	172
Giannitrapani v. Duke University	667
Gibson, Construction Co. v.	385
Gibson Products Co., Overman v.	516
Gilbert, S. v.	130
Gordon, S. v.	120
Gray v. Gray	205
Greene, S. v.	507
Grier, S. v.	281
Gudger v. Furniture, Inc.	387
Guyton v. Board of Transportation	87
Haddock v. Smithson	228
Hamrick, S. v.	143
Harnett County, Utilities Comm. v.	24
Harrington Manufacturing Co., Manufacturing Co. v.	97
Hatley, In re	413
Henning, Alligood v.	126
Hickory White Trucks, Inc. v. Bridges	355
High Point, Joyce v.	346

	PAGE
Highway Comm., Bridge Co. v.	535
Holman, Redevelopment Comm. v.	395
Horn, Price v.	10
Hospital, Spillman v.	406
Hospital, Wright v.	91
Hucks Piggyback Service, Inc., Transportation Systems v.	289
Hughes, Stokley v.	351
Hunt, Lowe's v.	84
Hyde Insurance Agency v. Noland	503
Industrial Metal Treating Corp. v. Realty Co.	620
Industries, Inc., Inscoe v.	1
Ingram, Comr. of Insurance, Insurance Co. v.	741
Inland Bridge Co. v. Highway Comm.	535
In re Appeal of Matthews	401
In re Hatley	413
In re Investigation by Attorney General	585
In re McMillan	235
In re Will of Wadsworth	593
Inscoe v. Industries, Inc.	1
Insurance Agency v. Noland	503
Insurance Co. v. Ingram, Comr. of Insurance	741
Insurance Designers Underwriters Group, Inc., Tifco, Inc. v.	641
Intermodal Transportation Systems v. Service, Inc.	289
Jackson, S. v.	187
J. C. Penney Co., Edmisten, Attorney General v.	368
Johnson, S. v.	376
Jordan, S. v.	529
Joyce v. City of High Point	346
King Drug Co., Rodd v.	564
Konopisos v. Phillips	209
Laboratories, Inc. v. Turner	686
Lamb, S. v.	255
Leasing Associates v. Rowland	590
Lentz v. Gardin	379
Life Assurance Co. of Carolina, Self v.	558
Lowe's of Shelby, Inc. v. Hunt	84
McClain, Supply Co. v.	132
McKenzie, S. v.	64
McLean, Fowler v.	393
McMillan, In re	235
Majette, S. v.	120
Manganello v. Permastone, Inc.	696
Mangum, S. v.	311
Manufacturing Co. v. Manufacturing Co.	97
Marilyn's Shoes, Gallimore v.	628
Martin, S. v.	166
Martin, S. v.	512
Matthews, In re Appeal of	401
Metal Treating Corp. v. Realty Co.	620
Migrant & Seasonal Farmworkers Association, Pulley v.	94
Mohr, Town of Southern Pines v.	342
Monroe Construction Co. v. Coan	731
Moore, Brice v.	365
Moore v. Trust Co.	390
Mosley v. Savings and Loan Assoc.	522
Noland, Insurance Agency v.	503
Norfolk-Southern Railway, Poore v.	104
N. C. Automobile Rate Administrative Office, Comr. of Insurance v.	427
N. C. Automobile Rate Administrative Office, Comr. of Insurance v.	477
N. C. Board of Transportation, Guyton v.	87
N. C. Comr. of Insurance, Insurance Co. v.	741
N. C. Dept. of Transportation, Darnell v.	328
N. C. Fire Insurance Rating Bureau, Comr. of Insurance v.	487
N. C. Fire Insurance Rating Bureau, Comr. of Insurance v.	549

	PAGE
N. C. Monroe Construction Co. v. Coan	731
N. C. State Board of Alcoholic Control, Fay v.	492
N. C. State Highway Comm., Bridge Co. v.	535
N. C. State Secretary of Revenue, Realty Corp. v.	261
N. C. State Secretary of Revenue, Stanback v.	533
N. C. Wildlife Resources Comm., Cannady v.	247
Norton v. Sawyer	420
Ogburn, Critcher v.	182
Oil Co. v. Pochna	360
Overman v. Products Co.	516
Parsons v. Bailey	497
Penney Co., Edmisten, Attorney General v.	368
Permastone, Inc., Manganello v.	696
Perpetual Savings and Loan Assoc., Mosley v.	522
Pevia, S. v.	79
Phil Mechanic Construction Co. v. Gibson	385
Phillips, Konopisos v.	209
Piedmont Equipment Co. v. Weant	191
Pochna, Oil Co. v.	360
Ponder v. Budweiser of Asheville	200
Poore v. Railway	104
Postle, S. v.	298
Powell Manfacturing Co. v. Manufacturing Co.	97
Presnell, S. v.	507
Price v. Horn	10
Privette v. Privette	41
Privette v. Privette	305
Products, Overman v.	516
Pulley v. Association	94
Puryear, S. v.	719
Railway, Poore v.	104
Raines, S. v.	176
Rating Bureau, Comr. of Insurance v.	487
Rating Bureau, Comr. of Insurance v.	549
Rating and Inspection Bureau, Comr. of Insurance v.	332
Ready Mix Concrete v. Sales Corp.	526
Realty Co., Metal Treating Corp. v.	620
Realty Corp. v. Coble, Sec. of Revenue	261
Redevelopment Comm. v. Holman	395
Roberts v. Roberts	242
Rodd v. Drug Co.	564
Rogers, S. v.	298
Rose & Sons Ready Mix Concrete v. Sales Corp.	526
Rowe, S. v.	115
Rowland, Leasing Associates v.	590
Sales Corp., Ready Mix Concrete v.	526
Savings and Loan Assoc., Mosley v.	522
Sawyer, Norton v.	420
Seaman's Bank for Savings, Construction Co. v.	155
Secretary of Revenue, Realty Corp. v.	261
Secretary of Revenue, Stanback v.	533
Self v. Assurance Co.	558
Service, Inc., Transportation Systems v.	289
Shuler v. Dyeing Machine Co.	577
Shuler v. Talon Div. of Textron	570
Smithson, Haddock v.	228
Sneed, Wall v.	680
Southern Bell Telephone and Telegraph Co., In re Investigation by Attorney Genral	585
Southern Pines v. Mohr	342
Spillman v. Hospital	406
Sprinkle, S. v.	383
Stanback v. Coble, Sec. of Revenue	533
Stanback v. Stanback	322
Standard Brands, Coffer v.	134
S. v. Ashe	74
S. v. Barnes	671

	PAGE
S. v. Basinger	45
S. v. Bryson	71
S. v. Burchfield	128
S. v. Burrus	250
S. v. Campbell	652
S. v. Carter	59
S. v. Cash	677
S. v. Chandler	646
S. v. Chavis	75
S. v. Chester	224
S. v. Clark	253
S. v. Cottingham	67
S. v. Cox	54
S. v. Culp	398
S. v. Duncan	112
S. v. Dupree	232
S. v. Eppley	217
S. v. Freedle	118
S. v. Gilbert	130
S. v. Gordon	120
S. v. Greene	507
S. v. Grier	281
S. v. Hamrick	143
S. v. Jackson	187
S. v. Johnson	376
S. v. Jordan	529
S. v. Lamb	255
S. v. McKenzie	64
S. v. Majette	120
S. v. Mangum	311
S. v. Martin	166
S. v. Martin	512
S. v. Pevia	79
S. v. Postle	298
S. v. Presnell	507
S. v. Puryear	719
S. v. Raines	176
S. v. Rogers	298
S. v. Rowe	115
S. v. Sprinkle	383
S. v. Terry	232
S. v. Terry	372
S. v. Tolley	213
S. v. Vanderhall	239
S. v. Warren	372
S. v. Watlington	101
S. v. Wilson	149
S. v. Wingo	123
S. ex rel. Comr. of Insurance v. Automobile Rate Office	427
S. ex rel. Comr. of Insurance v. Automobile Rate Office	477
S. ex rel. Comr. of Insurance v. Rating Bureau	487
S. ex rel. Comr. of Insurance v. Rating Bureau	549
S. ex rel. Comr. of Insurance v. Rating and Inspection Bureau	332
S. ex rel. Edmisten, Attorney General v. Penney Co.	368
S. ex rel. Utilities Comm. v. County of Harnett	24
S. ex rel. Utilities Comm. v. Edmisten, Atty. General	459
S. ex rel. Utilities Comm. v. Edmisten, Atty. General	474
S. ex rel. Utilities Comm. v. Edmisten, Atty. General	475
S. ex rel. Utilities Comm. v. Utility Co.	336
State Board of Alcoholic Control, Fay v.	492
State Board of Transportation, Guyton v.	87
State Dept. of Transportation, Darnell v.	328
State Highway Comm., Bridge Co. v.	535
State Secretary of Revenue, Realty Corp. v.	261
State Secretary of Revenue, Stanback v.	533
State Wholesale Supply, Inc. v. Allen	272
State Wildlife Resources Comm., Cannady v.	247
Stiles, Evans v.	317
Stokley v. Hughes	351
Stokley v. Stokley	351
Stutts v. Swaim	611
Suitt Construction Co. v. Bank	155
Supply Co. v. McClain	132
Supply, Inc. v. Allen	272
Swaim, Stutts v.	611
Talon Div. of Textron, Shuler v.	570
Taurus Construction Co., Bank v.	220
T & D Realty Co., Metal Treating Corp. v.	620

	PAGE
Telephone Company, In re Investigation by Attorney General	585
Tenney, Beasley-Kelso Associates v.	708
Terry, S. v.	232
Terry, S. v.	372
Thornton v. Cartwright	674
Thorp Sales Corp., Ready Mix Concrete v.	526
Tifco, Inc. v. Underwriters Group, Inc.	641
Tilley v. Tilley	581
Tolley, S. v.	213
Town of Southern Pines v. Mohr	342
Townsend v. Frye	634
Transitional Furniture, Inc., Gudger v.	387
Transportation Systems v. Service, Inc.	289
Transylvania Utility Co., Utilities Comm. v.	336
Travenol Laboratories, Inc. v. Turner	686
Trucks, Inc. v. Bridges	355
Trust Co., Moore v.	390
Trust Co., Williams v.	18
Turner, Laboratories, Inc. v.	686
Underwriters Group, Inc., Tifco, Inc. v.	641
Utilities Comm. v. County of Harnett	24
Utilities Comm. v. Edmisten, Atty. General	459
Utilities Comm. v. Edmisten, Atty. General	474
Utilities Comm. v. Edmisten, Atty. General	475
Utilities Comm. v. Utility Co.	336
Utility Co. v. Utilities Comm. v.	336
Vanderhall, S. v.	239
Victory Cab Co., Alford v.	657
Virginia Electric and Power Co. v. Edmisten, Atty. General	474
Wachovia Bank and Trust Co., Moore v.	390
Wachovia Bank and Trust Co., Williams v.	18
Wadsworth, In re Will of	593
Wall v. Sneed	680
Warren, S. v.	372
Watlington, S. v.	101
Weant, Equipment Co. v.	191
Whitten v. AMC/Jeep, Inc.	161
W. H. King Drug Co., Rodd v.	564
Wildlife Resources Comm., Cannady v.	247
Wilkerson, Burwell v.	110
Williams v. Trust Co.	18
Williamson v. Basinger	50
Wilson Memorial Hospital, Wright v.	91
Wilson, S. v.	149
Wingo, S. v.	123
Wright v. Hospital	91

CASES REPORTED WITHOUT PUBLISHED OPINION

	PAGE
Adams, In re	259
Albert, S. v.	751
Amburgey, S. v.	259
Automobile Rate Office, Comr. of Insurance v.	596
Automobile Rate Office v. Ingram	596
Barton, S. v.	258
Bazemore v. Johnson	259
Beckwith, Cross v.	259
Bennett, S. v.	259
Blanton and Widemon, S. v.	258
Board of Trade, House of Cheese v.	259
Board of Transportation v. Phelps	258
Boles, S. v.	597
Bond, S. v.	258
Bridges, S. v.	259
Bryant, S. v.	260
Burrell, O'Kelley v.	597
Byrd v. Byrd	259
Byrd, S. v.	258
Caldwell, S. v.	597
Carter, S. v.	258
Chance v. Jackson	405
Clark, In re Custody of	597
Collins, S. v.	405
Comr. of Insurance v. Automobile Rate Office	596
Comr. of Insurance v. Motors Ins. et al	596
Coughenour, S. v.	751
Cross v. Beckwith	259
Dallas, S. v.	258
DeWalt, S. v.	260
Dismukes v. Dismukes	405
Dodd, S. v.	260
Durden, S. v.	405
Edmisten, Utilities Comm. v.	260
Elam, S. v.	597
Eskridge v. Eskridge	405
Everhart, S. v.	260
Fox v. Miller	405
Freiwirth v. Freiwirth	751
French, S. v.	751
George, S. v.	258
Godbey, S. v.	260
Harris v. Mock et al	258
Hill v. Parrish	405
Hill, S. v.	405
Hines, S. v.	751
Holden v. Holden	751
House of Cheese v. Board of Trade	259
Humes v. Humes	597
Hutchins, In re	259
Ingram, Automobile Rate Office v.	596
In re Adams	259
In re Custody of Clark	597
In re Hutchins	259
In re Lewis	751
Insurance Co., Macon v.	258
Jackson, Chance v.	405
Johnson, Bazemore v.	259
Lewis, In re	751
Locklear, S. v.	751
McDaniels v. McDougald	259
McDougald, McDaniels v.	259
McKenzie, S. v.	258
McKoy, S. v.	258
McRae, S. v.	405
Macon v. Insurance Co.	258
Marshall, S. v.	751
Mendenhall v. Mendenhall	597
Miller, Fox v.	405
Mitchell, S. v.	751
Mock, Harris v.	258
Moore v. Moore	259
Motors Ins. et al, Comr. of Insurance v.	596
Nance, S. v.	597
Norris, S. v.	751
Norton and Norton, S. v.	258
O'Kelley v. Burrell	597

	PAGE
Parker, S. v.	258
Parrish, Hill v.	405
Phelps, Board of Transportation v.	258
Purcell, S. v.	258
Riggsbee, S. v.	597
Salter, Williamson v.	405
Shoaf, Telephone Co. v.	597
Short, S. v.	751
S. v. Albert	751
S. v. Amburgey	259
S. v. Barton	258
S. v. Bennett	259
S. v. Blanton and Widemon	258
S. v. Boles	597
S. v. Bond	258
S. v. Bridges	259
S. v. Bryant	260
S. v. Byrd	258
S. v. Caldwell	597
S. v. Carter	258
S. v. Collins	405
S. v. Coughenour	751
S. v. Dallas	258
S. v. DeWalt	260
S. v. Dodd	260
S. v. Durden	405
S. v. Elam	597
S. v. Everhart	260
S. v. French	751
S. v. George	258
S. v. Godbey	260
S. v. Hill	405
S. v. Hines	751
S. v. Locklear	751
S. v. McKenzie	258
S. v. McKoy	258
S. v. McRae	405
S. v. Marshall	751
S. v. Mitchell	751
S. v. Nance	597
S. v. Norris	751
S. v. Norton and Norton	258
S. v. Parker	258
S. v. Purcell	258
S. v. Riggsbee	597
S. v. Short	751
S. v. Stone	751
S. v. Thigpen	405
S. v. Thompson	260
S. v. Treadway	260
S. v. Washington & Partlow	751
S. v. Welborn	258
S. v. White	260
S. v. Whitted	259
S. v. Williams	405
S. v. Winfrey	751
S. v. Wray and Woods	259
S. v. Wright	405
Stone, S. v.	751
Sullivan v. Sullivan	259
Telephone Co. v. Shoaf	597
Thigpen, S. v.	405
Thompson, S. v.	260
Treadway, S. v.	260
Utilities Comm. v. Edmisten	260
Washington & Partlow, S. v.	751
Welborn, S. v.	258
White, S. v.	260
Whitted, S. v.	259
Williams, S. v.	405
Williams v. Williams	597
Williamson v. Salter	405
Winfrey, S. v.	751
Wray and Woods, S. v.	259
Wright, S. v.	405
Young v. Young	259

GENERAL STATUTES CITED AND CONSTRUED

G.S.	
1-15	Shuler v. Dyeing Machine Co., 577
1-15(b)	Shuler v. Dyeing Machine Co., 577
1-51	Poore v. Railway, 104
1-52	Poore v. Railway, 104
1-52(5)	Shuler v. Dyeing Machine Co., 577
1-75.4	Bank v. Funding Corp., 172
1-180	State v. Chester, 224
1-181	State v. Jackson, 187
1-277(a)	Equipment Co. v. Weant, 191
1-279	Giannitrapani v. Duke University, 667
1A-1	See Rules of Civil Procedure infra
6-21.2	Supply, Inc. v. Allen, 272
7A-271(b)	State v. Cash, 677
7A-278(4)	In re McMillan, 235
8-50.1	Brondum v. Cox, 35
8-51	Spillman v. Hospital, 406
	In re Will of Wadsworth, 593
14-3(a)	State v. Puryear, 719
14-7	State v. Martin, 166
14-39	State v. Wingo, 123
14-71	State v. Burchfield, 128
15-145	State v. Wilson, 149
15-200.1	State v. Cash, 677
15A-256	State v. Watlington, 101
15A-402	State v. Mangum, 311
15A-926	State v. Majette, 120
15A-926(b)(2)	State v. Cottingham, 67
	State v. Bryson, 71
	State v. Pevia, 79
15A-941	State v. Carter, 59
15A-951	State v. Duncan, 112
15A-951(a)(2), (3)	State v. Majette, 120
15A-957	State v. Jackson, 187
18A-26(a)	State v. Terry, 372
18A-34(a)(4)	Fay v. Board of Alcoholic Control, 492
19A-10 et seq.	Cannady v. Wildlife Resources Comm., 247
20-28(a)	State v. Chester, 224
20-48	State v. Chester, 224
20-138(a), (b)	State v. Basinger, 45
20-140(c)	State v. Burrus, 250
20-222	State v. Freedle, 118

G.S.	
20-227	State v. Freedle, 118
20-231	State v. Freedle, 118
24-2	Supply, Inc. v. Allen, 272
24-11	Supply, Inc. v. Allen, 272
24-11(a)	Insurance Agency v. Noland, 503
25-2-313(1)(a), (b)	Coffer v. Standard Brands, 134
25-2-314(2)(a), (c)	Coffer v. Standard Brands, 134
25-2-715(2)	Rodd v. Drug Co., 564
25-9-306	Bank v. Construction Co., 220
47-18(a)	Oil Co. v. Pochna, 360
50-13.4(e)	Arnold v. Arnold, 683
50-13.6	Arnold v. Arnold, 683
50-13.7	Tilley v. Tilley, 581
Ch. 58, Art. 13	Insurance Co. v. Ingram, Comr. of Insurance, 741
Ch. 58, Art. 25	Comr. of Insurance v. Automobile Rate Office, 477
58-27.2(a)	Comr. of Insurance v. Rating Bureau, 487
	Comr. of Insurance v. Rating Bureau, 549
58-30.3, .4	Comr. of Insurance v. Automobile Rate Office, 477
58-56.1(c)	Insurance Agency v. Noland, 503
58-131.1	Comr. of Insurance v. Rating Bureau, 487
	Comr. of Insurance v. Rating Bureau, 549
58-131.2	Comr. of Insurance v. Rating Bureau, 487
58-131.3A	Insurance Co. v. Ingram, Comr. of Insurance, 741
58-248	Comr. of Insurance v. Automobile Rate Office, 477
58-248.1	Comr. of Insurance v. Automobile Rate Office, 477
62-73	Utilities Comm. v. County of Harnett, 24
62-133	Utilities Comm. v. County of Harnett, 24
	Utilities Comm. v. Edmisten, Atty. General, 459
62-133.1(b)	Utilities Comm. v. Utility Co., 336
62-134(e)	Utilities Comm. v. Edmisten, Atty. General, 459
62-136(a)	Utilities Comm. v. Edmisten, Atty. General, 459
Ch. 75	In re Investigation by Attorney General, 585
75-1.1	Edmisten, Attorney General v. Penney Co., 368
97-2(2)	Wright v. Hospital, 91
97-12	Inscoe v. Industries, Inc., 1
97-47	Shuler v. Talon Div. of Textron, 570
105-29(a)	Stanback v. Coble, Sec. of Revenue, 533
115-248	State v. Rogers, 298
115-253	State v. Rogers, 298
122-36	In re Hatley, 413
122-58.7(i)	In re Hatley, 413
136-29	Bridge Co. v. Highway Comm., 535
136-54	Guyton v. Board of Transportation, 87
148-4	State v. Eppley, 217
148-45	State v. Eppley, 217

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

Rule No.	
4(b)	Ready Mix Concrete v. Sales Corp., 526
4(i)	Ready Mix Concrete v. Sales Corp., 526
5(b)	Supply Co. v. McClain, 132
6(b)	Privette v. Privette, 41
6(d), (e)	Barnes v. Barnes, 196
7(b)(1)	Barnes v. Barnes, 196
8(c)	Haddock v. Smithson, 228
9(g)	Ponder v. Budweiser of Asheville, 200
	Rodd v. Drug Co., 564
54(c)	Tifco, Inc. v. Underwriters Group, Inc., 641
55(d)	Privette v. Privette, 41
60	Burwell v. Wilkerson, 110
60(b)(1)	Norton v. Sawyer, 420
60(b)(3)	Stokley v. Stokley, 351
60(b)(4)	Stokley v. Stokley, 351
60(b)(6)	Stokley v. Stokley, 351
	Norton v. Sawyer, 420
70	Price v. Horn, 10

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Case	*Reported*	*Disposition in Supreme Court*
Bank v. Construction Co.	30 N.C. App. 220	Denied, 290 N.C. 659
Barnes v. Barnes	30 N.C. App. 196	Denied, 290 N.C. 775
Beasley-Kelso Associates v. Tenney	30 N.C. App. 708	Denied, 291 N.C. 323
Black v. Black	30 N.C. App. 403	Denied, 290 N.C. 775 Appeal Dismissed
Cannady v. Wildlife Resources Comm.	30 N.C. App. 247	Denied, 290 N.C. 775 Appeal Dismissed
Chance v. Jackson	30 N.C. App. 405	Denied, 290 N.C. 775
Comr. of Insurance v. Motors Insurance Corp. et al	30 N.C. App. 596	Allowed, 291 N.C. 175
Comr. of Insurance v. Rating Bureau	30 N.C. App. 549	Allowed, 291 N.C. 175
Construction Co. v. Coan	30 N.C. App. 731	Denied, 291 N.C. 323
Cross v. Beckwith	30 N.C. App. 259	Allowed, 290 N.C. 775
Darnell v. Dept. of Transportation	30 N.C. App. 328	Denied, 290 N.C. 776
Fay v. Board of Alcoholic Control	30 N.C. App. 492	Denied, 291 N.C. 175
Fowler v. McLean	30 N.C. App. 393	Denied, 290 N.C. 776
Haddock v. Smithson	30 N.C. App. 228	Denied, 290 N.C. 776
Hill v. Parrish	30 N.C. App. 405	Denied, 290 N.C. 776
House of Cheese v. Bd. of Trade	30 N.C. App. 259	Denied, 290 N.C. 776
In re Appeal of Matthews	30 N.C. App. 401	Denied, 291 N.C. 175
In re Will of Wadsworth	30 N.C. App. 593	Denied, 291 N.C. 175
Inscoe v. Industries, Inc.	30 N.C. App. 1	Allowed, 290 N.C. 777
Lentz v. Gardin	30 N.C. App. 379	Allowed, 290 N.C. 777
Lowe's v. Hunt	30 N.C. App. 84	Denied, 290 N.C. 662
Macon v. Insurance	30 N.C. App. 258	Denied, 290 N.C. 662
Manufacturing Co. v. Manufacturing Co.	30 N.C. App. 97	Allowed for Limited Purpose, 290 N.C. 662 Appeal Dismissed
Mendenhall v. Mendenhall	30 N.C. App. 597	Denied, 290 N.C. 777

Case	*Reported*	*Disposition in Supreme Court*
Metal Treating Corp. v. Realty Co.	30 N.C. App. 620	Denied, 291 N.C. 324
Norton v. Sawyer	30 N.C. App. 420	Denied, 291 N.C. 176
Oil Co. v. Pochna	30 N.C. App. 360	Denied, 291 N.C. 176
Parsons v. Bailey	30 N.C. App. 497	Denied, 291 N.C. 176
Ponder v. Budweiser of Asheville	30 N.C. App. 200	Denied, 291 N.C. 176
Poore v. Railway	30 N.C. App. 104	Denied, 290 N.C. 777
Price v. Horn	30 N.C. App. 10	Denied, 290 N.C. 663
Realty Corp. v. Coble, Sec. of Revenue	30 N.C. App. 261	Allowed, 290 N.C. 777
Redevelopment Comm. v. Holman	30 N.C. App. 395	Denied, 290 N.C. 778
Self v. Assurance Co.	30 N.C. App. 558	Denied, 291 N.C. 176
Shuler v. Dyeing Machine Co.	30 N.C. App. 577	Denied, 291 N.C. 177
Stanback v. Coble, Sec. of Revenue	30 N.C. App. 533	Denied, 291 N.C. 177
Stanback v. Stanback	30 N.C. App. 322	Denied, 290 N.C. 778
State v. Ashe	30 N.C. App. 74	Denied, 290 N.C. 664
State v. Bryant	30 N.C. App. 260	Denied, 290 N.C. 778
State v. Bryson	30 N.C. App. 71	Denied, 290 N.C. 664
State v. Campbell	30 N.C. App. 652	Denied, 291 N.C. 324 Appeal Dismissed
State v. Carter	30 N.C. App. 59	Denied, 290 N.C. 664 Appeal Dismissed
State v. Chavis	30 N.C. App. 75	Denied, 290 N.C. 778
State v. Dallas	30 N.C. App. 258	Denied, 290 N.C. 778
State v. DeWalt	30 N.C. App. 260	Denied, 290 N.C. 664
State v. Dodd	30 N.C. App. 260	Denied, 290 N.C. 779
State v. Duncan	30 N.C. App. 112	Denied, 290 N.C. 779
State v. Durden	30 N.C. App. 405	Denied, 290 N.C. 779
State v. Eppley	30 N.C. App. 217	Denied, 290 N.C. 779 Appeal Dismissed
State v. Everhart	30 N.C. App. 260	Allowed, 290 N.C. 664
State v. Freedle	30 N.C. App. 118	Denied, 290 N.C. 779 Appeal Dismissed
State v. Freedle	30 N.C. App. 118	Denied Rehearing 291 N.C. 325

Case	*Reported*	*Disposition in Supreme Court*
State v. Grier	30 N.C. App. 281	Denied, 291 N.C. 177
State v. Hamrick	30 N.C. App. 143	Denied, 290 N.C. 780
State v. Hill	30 N.C. App. 405	Denied, 290 N.C. 780
State v. Hines	30 N.C. App. 751	Denied, 291 N.C. 325
State v. Johnson	30 N.C. App. 376	Denied, 291 N.C. 177
State v. Jordan	30 N.C. App. 529	Denied, 290 N.C. 665
State v. McKenzie	30 N.C. App. 64 30 N.C. App. 258	Denied, 291 N.C. 177
State v. Marshall	30 N.C. App. 751	Denied, 292 N.C.
State v. Norton and Norton	30 N.C. App. 258	Denied, 290 N.C. 665
State v. Pevia	30 N.C. App. 79	Denied, 290 N.C. 780 Appeal Dismissed
State v. Puryear	30 N.C. App. 719	Denied, 291 N.C. 325 Appeal Dismissed
State v. Raines	30 N.C. App. 176	Denied, 290 N.C. 780
State v. Riggsbee	30 N.C. App. 597	Denied, 291 N.C. 178
State v. Rogers (Rodgers)	30 N.C. App. 298	Denied, 290 N.C. 781
State v. Tolley	30 N.C. App. 213	Denied, 291 N.C. 178
State v. Tuttle	28 N.C. App. 198	Denied, 291 N.C. 716
State v. Washington and Partlow	30 N.C. App. 751	Denied, 291 N.C. 178
State v. Watlington	30 N.C. App. 101	Denied, 290 N.C. 666 Appeal Dismissed
State v. Welborn	30 N.C. App. 258	Denied, 290 N.C. 666
State v. White	30 N.C. App. 260	Denied, 290 N.C. 781
State v. Wray and Woods	30 N.C. App. 259	Denied, 290 N.C. 666 Appeal Dismissed
State v. Wright	30 N.C. App. 405	Denied, 290 N.C. 781
Stutts v. Swaim	30 N.C. App. 611	Denied, 291 N.C. 178
Townsend v. Frye	30 N.C. App. 634	Denied, 291 N.C. 178
Utilities Comm. v. Utility Co.	30 N.C. App. 336	Denied, 291 N.C. 179 Appeal Dismissed
Whitten v. AMC/Jeep, Inc.	30 N.C. App. 161	Allowed, 290 N.C. 781
Williams v. Trust Co.	30 N.C. App. 18	Allowed, 290 N.C. 667
Williamson v. Salter	30 N.C. App. 405	Denied, 290 N.C. 782
Wright v. Memorial Hospital	30 N.C. App. 91	Denied, 290 N.C. 668

DISPOSITION OF APPEALS OF RIGHT TO THE SUPREME COURT

Case	*Reported*	*Disposition on Appeal*
Brondum v. Cox	30 N.C. App. 35	292 N.C. 192
Comr. of Insurance v. Automobile Rate Office	30 N.C. App. 427	292 N.C. 1
Comr. of Insurance v. Rating Bureau	29 N.C. App. 237	291 N.C. 55
Comr. of Insurance v. Rating Bureau	30 N.C. App. 487	292 N.C. 70
Farmer v. Chaney	29 N.C. App. 544	292 N.C.
Gallimore v. Marilyn's Shoes	30 N.C. App. 628	292 N.C.
Henry v. Henry	29 N.C. App. 174	291 N.C. 156
In re Hatley	30 N.C. App. 413	291 N.C. 693
In re Will of Ricks	28 N.C. App. 649	292 N.C. 28
Manganello v. Permastone, Inc	30 N.C. App. 696	291 N.C. 666
State v. Asbury	29 N.C. App. 291	291 N.C. 164
State v. Gainey	29 N.C. App. 653	Pending
State v. McKenzie	29 N.C. App. 524	Pending
State v. Sauls	29 N.C. App. 457	291 N.C. 253
Utilities Comm. v. Edmisten, Atty. General	29 N.C. App. 258	291 N.C. 327
Utilities Comm. v. Edmisten, Atty. General	29 N.C. App. 428	291 N.C. 424
Utilities Comm. v. Edmisten, Atty. General	30 N.C. App. 459	291 N.C. 451
Utilities Comm. v. Edmisten, Atty. General	30 N.C. App. 474	291 N.C. 477
Utilities Comm. v. Edmisten, Atty. General	30 N.C. App. 475	291 N.C. 478

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

LARRY P. INSCOE v. DEROSE INDUSTRIES, INC. AND CONTINENTAL CASUALTY CO.

No. 7526IC841

(Filed 7 July 1976)

Master and Servant § 57— workmen's compensation — injury not occasioned by intoxication — intoxication not sole cause of accident

Benefits under the Workmen's Compensation Act should be foreclosed only when the evidence shows that the claimant's intoxication was the sole cause of the accident and not simply a factor from which the causal acts ultimately arose. Former G.S. 97-12.

APPEAL by defendants from order of the North Carolina Industrial Commission entered 21 July 1975. Heard in the Court of Appeals 12 February 1976.

Plaintiff alleged that he suffered injuries in an automobile accident on 29 September 1973, and that the injuries and accident arose out of and in the course of his employment with the defendant mobile home manufacturer.

At the hearing before the deputy commissioner, plaintiff's evidence tended to show that he sustained serious injuries when the company-owned van which he was operating collided head-on with a vehicle driven by one David Orville Houck. Plaintiff testified that the collision occurred while he was travelling to a

particular job site, and as he ". . . was proceeding down Highway 161, I noticed this car. He [i.e. Houck] was in my lane and it did not dawn on me exactly what he was doing. I noticed that he was coming kind of fast, so I kind of braced myself in the truck and just hoped that he would pull over into his lane. I looked to the right and I saw a ditch and woods and I looked to the left and I saw nothing else in the road. It was just his car and me and my wife, who I could see in the rear-view mirror. I knew at that point I was going to have a collision if he didn't get over in his lane, so I was looking for a place to try to go to avoid the accident. I looked to the right, and I knew if I went over to the right, I would have gone down a ditch and into the woods. The only thing I could see was trying to get around him in the passing lane and try to avoid hitting him. At that time, I slammed on my brakes and started around him. I had his car cleared and I started to straighten my vehicle back out, that's when he cut back into the lane he was supposed to have been in and that's all I remember. The two vehicles collided there."

David Orville Houck, testifying for defendants, contradicted plaintiff's version, stating on cross-examination that when he " . . . saw Mr. Inscoe, he was on my side of the road. I hollered out to the rest of the boys in my car, 'That guy is playing chicken', and that's all I said. I just did it to alert them. You know it might be an accident or something. In response to your question, I did not say here comes a car, let's see if he is chicken. I did not decide to play chicken or run him off the road or make him frightened and run him off the road. During that day I had had five or six beers in all. I had a sandwich to eat in Cherryville and ate some hot weiners and eggs and things like that in a beer joint. I was on my side of the road, which was the right side of the road. I had drunk five beers and can recall about the night before and knew what I was doing. I was traveling about 55 or 60 miles per hour at the time. I was about a mile or mile and a half away from Inscoe when I first saw him. I saw him come out of the curve. At that time, he was on my side of the road. I kept watching him and he stayed on my side of the road. When he didn't move, I did. I went to his side of the road when he didn't move and when I went over, he came over. When I started back, he did. I was trying to dodge him. The cars collided on the right-hand side of the road. According to the patrolman's statement it was seven feet across the center line on the right-hand side.

Immediately prior to the collision, I had been on the left-hand side, but then I cut back to the right. I don't know how long it was after I cut back to the right that the collision occurred."

The evidence further tended to show that both plaintiff and Mr. Houck were intoxicated at the time of the mishap.

The deputy commissioner found that on the day in question, the plaintiff, while intoxicated, " . . . met an on-coming car headed north on Highway 161. The highway at this point is straight and level for a distance of one-fourth to one-half mile. It was daylight and the weather was clear. The approaching car appeared to be in the plaintiff's lane of travel, so the plaintiff tried to go around the other vehicle by pulling into the other lane for northbound traffic. The other vehicle then came back into its proper lane of travel, and the two vehicles collided head-on in the other vehicle's lane of travel." More specifically, the deputy commissioner determined that the plaintiff " . . . was intoxicated at the time of his injury on September 29, 1973, and said accident and resulting injury was occasioned by his intoxication."

Based on the foregoing, the deputy commissioner denied plaintiff's claim for compensation.

Plaintiff appealed to the Full Commission, which received no additional evidence. Reversing the deputy commissioner's decision, the Full Commission stated that the

> " . . . plaintiff met an on-coming car headed north on Highway 161. The highway at this point is straight and level for a distance of one-fourth to one-half mile. It was daylight, and the weather was clear. The approaching car was traveling at a high rate of speed and was in plaintiff's lane of travel. When the oncoming vehicle did not return to its proper lane of travel, plaintiff applied his brakes and tried to go around the other vehicle by pulling into the northbound lane. The other vehicle then returned to its proper lane of travel and collided with plaintiff's vehicle which was still in the northbound lane.
>
> 14. Plaintiff's blood alcohol level was .15% approximately two hours after the accident which gave rise to his injuries. Plaintiff was intoxicated at the time of the accident. . . . However, said accident and injury were not occasioned by his intoxication.

15. Plaintiff sustained the injuries complained of by accident arising out of and in the course of his employment."

Defendants appealed from the order awarding plaintiff compensation.

Olive, Howard, Downer, Williams & Price, by Carl W. Howard, for plaintiff appellee.

Jones, Hewson & Woolard, by H. C. Hewson, for defendant appellants.

MORRIS, Judge.

Defendants contend that the Full Commission, by ostensibly requiring denial of compensation only in those instances where a claimant's intoxication was *the sole* proximate cause of the accident and resulting injuries, erred in concluding that the plaintiff's accident and injury were not occasioned by his intoxication. Specifically, defendants, arguing that the Full Commission misinterpreted the applicable law, cite the intoxication forfeiture of compensation provision under former G.S. 97-12 and maintained that the " . . . clear language of the statute indicates that a plaintiff is precluded from compensation if his intoxication proximately caused the accident . . . [and that] [t]here was clearly *a* causal relationship between th[is] plaintiff's intoxication and the accident and resulting injuries." (Emphasis supplied.)

This appeal presents a question of first impression for North Carolina. The problem, stated simply, is whether former G.S. 97-12 requires denial of compensation only in those instances where the claimant's intoxication was *the sole* proximate cause for the accident and resulting injuries or whether statutory forfeiture arises, as appellants claim, when the intoxication was simply *a* proximate cause or stage from which the injuries result. In short, defendants raise the question of whether "occasioned by" means *the sole proximate cause* of the injuries sustained or *a proximate cause of the injuries* sustained. Previous North Carolina case law in this general area has never defined the term.

In *Osborne v. Ice Co.*, 249 N.C. 387, 106 S.E. 2d 573 (1959), there was evidence that the employee was intoxicated, attempted to pass a truck going in the same direction, skidded his car across the center line of the highway in the path of an

oncoming car, and the two vehicles collided. The employee was killed. The hearing commissioner found as a fact that the employee "was intoxicated at the time of his said injury resulting in his death; that his intoxication was the sole proximate cause of his attempting to pass the truck on the occasion herein complained of, of the manner in which he was driving his automobile at said time, and of the resulting collision with the automobile driven by Jimmy Wilson; and that his said injury, resulting in his death, was occasioned by said intoxication," and denied the claim. The Full Commission affirmed and adopted the findings, conclusions of the commissioner, as did the superior court on appeal. On appeal to the Supreme Court, the plaintiff raised several questions, among them whether there was sufficient competent evidence of intoxication and, if so, whether there was sufficient competent evidence to support the findings that "the intoxication of the deceased occasioned the accident in which he was killed." The Court held that there was sufficient evidence of intoxication to support that finding. As to the other question the Court, at page 390, said

> "The evidence in the case showed that Osborne left skid marks for 75 feet in a straight line forward and then skid marks sidewise across the center line of the highway to his left, with the result the truck he was attempting to pass and his skidding automobile blocked both lanes of the highway. Wilson's car, in its proper lane, struck Osborne's car on the right-hand side near the middle. The Commission found the driver of the skidding car was intoxicated. In operating the car on the highway, he was violating a safety statute. Whether the accident was proximately caused by the violation was a question for the fact finding body."

In *Gant v. Crouch,* 243 N.C. 604, 607, 91 S.E. 2d 705 (1956), the hearing commissioner denied compensation, having found that the employee's death was occasioned by his intoxication. The Full Commission, on review, found that his death was not occasioned by his intoxication and made an award allowing compensation. The superior court, on appeal, affirmed the Full Commission. On appeal to the Supreme Court, Justice Higgins, speaking for the Court said:

> "In order to defeat the claim for compensation, however, the defendants sought to prove that death of the employee was occasioned by his intoxication. The burden of proof

was on the defendants (G.S. 97-12). There was evidence before the Commission that the pickup truck Gant was driving was forced off a very narrow mountain road by other vehicular traffic; that the shoulder of the road gave way, causing the vehicle to turn over and roll approximately 90 feet down the mountainside, killing Gant instantly. There was evidence from defendants' witness that Gant and his two companions had consumed about one-half pint of whiskey during a period of about four hours. There was evidence from one of defendants' witnesses that she and Oliver Paine had been with Gant from about noon, at which time they took one drink each, until the accident about 4:30; that Gant took another drink before they got to Soco Gap (time not given), and at Soco Gap he drank one bottle of beer. The witness further testified that Gant ate his lunch about 3:30 or 4:00 o'clock; that he had nothing to drink after that time. There was evidence the witness had made contradictory statements about the amount of liquor consumed. However, in the opinion of the Commission the defendants did not carry the burden of showing the death was occasioned by the intoxication of the employee. As was said by this Court in the case of *Brooks v. Rim & Wheel Co.*, 213 N.C. 518, 196 S.E. 835:

> 'There was competent evidence to support the contention of both plaintiff and defendant upon this question, but the Commission having found as a fact that the accident in which the plaintiff was injured was not occasioned by his intoxication, the Judge of the Superior Court was bound by such finding, and we are likewise bound.' " (Citations omitted.)

In *Yates v. Hajoca Corp.*, 1 N.C. App. 553, 162 S.E. 2d 119 (1968), claimant was employed by defendant as an outside salesman and had his office in his home in Hamlet. Every Thursday he drove to Charlotte, using a car furnished by defendant and maintained by defendant, to turn in orders received, money collected, and to discuss with defendant deliveries and procedures for billing for orders taken by him. The accident in which he received disabling injuries occurred while he was returning to his home in Hamlet from Charlotte from one of his Thursday trips to defendant's office. There was evidence that there was a whiskey bottle and two beer cans in the front seat of the car immediately after the accident which occurred

on a dark and foggy night when claimant's car left the highway in a curve and struck a tree. Writing for this Court, Chief Judge Mallard said at page 556:

> "The appellants also contend that the Commissioner and the full Commission committed error in failing to find that the injuries sustained by Thomas Henry Yates, Jr., were occasioned by his intoxication. The burden of proof as to this was on the defendants. G.S. 97-12. The appellee contends that the evidence was not sufficient to make such a finding. There was competent evidence to support the contention of both the plaintiff and defendants upon this question. By making an award in this case, the Commission has found that the defendants failed to carry the burden of proof that the plaintiff's injury was caused by his intoxication, and we are bound by such finding. *Gant v. Crouch,* 243 N.C. 604, 91 S.E. 2d 705."

In *Lassiter v. Town of Chapel Hill,* 15 N.C. App. 98, 189 S.E. 2d 769 (1972), there was conflicting evidence with respect to claimant's intoxication. The Commission found that " 'even though deceased had sufficient alcohol in his blood at the time of his death to be intoxicated, the death of deceased was not occasioned by intoxication.' " Lassiter, *supra,* at page 99. Defendants argued on appeal that the commissioner erred in failing to find the injuries resulting in claimant's death were occasioned by his intoxication or that he was or was not intoxicated as a matter of law at the time of the accident. We held that G.S. 97-12 does not require the commissioner to find whether the employee was intoxicated as a matter of law, because the statute does not require forfeiture of benefits if the employee is intoxicated at the time of the accident, but does require forfeiture if the injury or death "was occasioned by the intoxication." Judge Brock, now Chief Judge, writing for the Court, adopted Chief Judge Mallard's phraseology in saying, at page 101,

> "[a]lthough there was contradictory evidence, the Commissioner found that the injuries and death of Lassiter 'was not occasioned by intoxication.' The principle was succinctly stated by Chief Judge Mallard in *Yates v. Hajoca Corp.,* 1 N.C. App. 553, 162 S.E. 2d 119, as follows: 'By making an award in this case, the Commission has found that the defendants failed to carry the burden of proof that the

plaintiff's injury was caused by his intoxication, and we are bound by such finding.' "

Although none of these cases defined the phrase "occasioned by" in terms of proximate cause, we think it can fairly be said that, at least inferentially, they stand for the proposition that benefits under the Workmen's Compensation Act are foreclosed, with respect to intoxication, only if the claimant's intoxication was the sole proximate cause of his injuries or death.

We are of the opinion that a critical reading of our Workmen's Compensation law and a careful review of case law interpreting similarly worded statutes from other states support our conclusion that benefits under the Act should be foreclosed only when the evidence shows that the claimant's intoxication was *the sole cause* of the accident and not simply a factor from which the causal acts ultimately arose.

Under former G.S. 97-12, our General Assembly provided that "[n]o compensation shall be payable if the injury or death *was occasioned by* the intoxication of the employee . . . . " (Emphasis supplied.) In this regard, it first should be noted that as our Supreme Court stated in *Hartley v. Prison Department,* 258 N.C. 287, 290, 128 S.E. 2d 598 (1962), " ' . . . the various compensation acts were intended to eliminate the fault of the workman as a basis for denying recovery.' " (Citation omitted.) Also see: *Archie v. Lumber Co.,* 222 N.C. 477, 23 S.E. 2d 834 (1943). With the legislative mandate removing the legal barriers of negligence and even gross negligence from the context of a compensation case, our Supreme Court accurately isolated the unique place reserved in the Act for the intoxicated employee, and stated that "[o]nly intoxication or injury intentionally inflicted will defeat a claim." Hartley, *supra,* at 289. Stated differently, Workmen's Compensation is a law designed to eliminate certain common law barriers to recovery and the " ' . . . various Compensation Acts of the Union should be liberally construed to the end that the benefits thereof shall not be denied upon technical, narrow and strict interpretation.' " Hartley, *supra,* at 290-291. (Citation omitted.)

However, notwithstanding the above, the General Assembly did not intend to reward the intoxicated employee for his own folly if the inebriation occasioned the accident. As one court has stated, " '[t]he accident must be attributable to intoxication,

as opposed to simple negligence (which is not a defense).'" *Ray v. Superior Iron Works and Supply Co., Inc.*, 284 So. 2d 140, 144 (Ct. App. La. 1973); writ refused 286 So. 2d 365 (1973). (Citation omitted.) In short, the law has evolved in such a way that "fault" generally is no longer a consequence in Workmen's Compensation cases, but intoxication remains in the law as one carry-over aspect of "fault" which has been retained as a matter of legislative and public policy.

More specifically, we consider the problem of intoxication not in the narrow perspective of "fault" per se, but more accurately in terms of causation. See 1A Larson, Workmen's Compensation Law, § 34.33 (1973). This interpretation is, moreover, consistent with general case law interpreting the meaning of the term "occasion." See: *Iowa Mutual Insurance Company v. Faulkner*, 157 Texas 183, 300 S.W. 2d 639 (1957); *Merlo v. Public Service Co.*, 381 Ill. 300, 45 N.E. 2d 665 (1942); *Illinois Cent. R. Co. v. Oswald*, 338 Ill. 270, 170 N.E. 247 (1930); *De Tienne v. S. N. Nielsen Company*, 45 Ill. App. 2d 231, 195 N.E. 2d 240 (1963); *Buscaglia v. Owens-Corning Fiberglas*, 68 N.J. Super. 508, 172 A. 2d 703 (1961), affirmed 36 N.J. 532, 178 A. 2d 208 (1962); *Gay v. S. N. Nielsen Company*, 18 Ill. App. 2d 368, 152 N.E. 2d 468 (1958); *Smart v. Raymond*, 142 S.W. 2d 100 (Kansas City Ct. App. Mo. 1940). Also see: 65 C.J.S., Negligence, § 103, p. 1135.

When so viewed, we believe intoxication precluding recovery must be *the sole* cause of the mishap because to do otherwise would virtually read "fault" as negligence back into the statute in its broadest and most devastating sense. That is, to deny relief to a plaintiff, as these defendants so urge, would present a situation analogous to the common law understanding of contributory negligence which, of course, has been eliminated from Workmen's Compensation. To illustrate this point, we simply note that in the usual negligence case in which contributory negligence prevails as a defense, if plaintiff's negligence was *a* proximate cause of the mishap and not necessarily the *only* proximate cause, defendant is relieved of liability. It was this very result that Workmen's Compensation was designed to eliminate. Therefore, to cut a claimant off from Workmen's Compensation under former G.S. 97-12 fairness and consistency with the Act requires more than a finding that the intoxication was *a* proximate cause. It must have been *the sole* proximate cause.

Consistent with this analysis are cases interpreting South Carolina and New Mexico Workmen's Compensation laws which have intoxication forfeiture statutes similar to North Carolina's former G.S. 97-12. See Code Laws of South Carolina 1962, § 72-156; New Mexico Statutes, § 59-10-8. In both of those jurisdictions, the respective State Supreme Courts have held that the claimant's intoxication must be *the* proximate cause of the mishap in order to invoke the statutory forfeiture provisions of their respective state laws. See: *Parr v. New Mexico State Highway Department,* 54 N.M. 126, 215 P. 2d 602 (1950); *Reeves v. Carolina Foundry & Machine Works,* 194 So. C. 403, 9 S.E. 2d 919 (1940). As the South Carolina Court noted in *Reeves* at page 921, " . . . in order to bar a recovery, the injury must be occasioned by the intoxication of the employee, which means that *the* proximate cause of the injury must be the intoxication of the employee." (Emphasis supplied.) We consider the reasoning in these sister state decisions correct and we adopt their interpretation of the phrase "occasioned by" used in the statute applicable here.

The facts found by the Full Commission are fully supported by the evidence, both with respect to whether the accident was occasioned by claimant's intoxication and whether the accident arose out of and in the course of his employment.

The order and award of the North Carolina Industrial Commission is

Affirmed.

Judges VAUGHN and CLARK concur.

MRS. MARY SUE PRICE, ADMINISTRATRIX d/b/n/c/t/a OF THE ESTATE OF BASIL C. HORN v. SEVIL HORN AND NELL HORN

No. 7529SC852

(Filed 7 July 1976)

1. Contracts § 16; Judgments § 10— consent judgment — no condition precedent

A conveyance of land to defendant in accordance with the terms of a consent judgment was not a condition precedent to defendant's personal liability under terms of the consent judgment for interest

and penalties occasioned by defendant's failure as an executor to file estate and inheritance tax returns.

2. **Judgments § 10; Rules of Civil Procedure § 70— consent judgment — summary judgment — survey — order of conveyance**

Where a consent judgment required plaintiff to convey to defendant 14 acres of a larger tract "To be surveyed" and provided that defendant would be personally liable for the payment of interest and penalties resulting from defendant's failure as executor to file estate and inheritance tax returns and that defendant's property would be liable for payment of the interest and penalties, the trial court properly entered summary judgment for plaintiff in an action to recover from defendant the amount of tax interest and penalties and properly ordered a survey of the 14-acre tract, required plaintiff to convey the 14-tract to defendant, and provided that such tract could be sold to satisfy defendant's obligation for the tax interest and penalties. G.S. 1A-1, Rule 70.

ON *writ of certiorari* to review the proceedings before *Friday, Judge.* Judgment entered 14 May 1975 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 13 February 1976.

In 1968 B. C. Horn died, leaving a will by which he devised substantial property interests and under which his nephew, Sevil Horn, was appointed executor. Shortly thereafter, a caveat was filed. An action was also filed by devisees and legatees of B. C. Horn against Sevil Horn alleging mismanagement of the estate. The actions were consolidated for trial and judgment. The jury determined that the will was the last will and testament of B. C. Horn and it was admitted to probate in solemn form. The parties entered into a consent judgment adjudicating the other issues in controversy. Among other matters included in the judgment were the following provisions:

"1. That Mary Sue Price be adjudged to be the owner in fee simple absolute of all of the land known as the Paradise Farms (sometimes known as the Hamilton Quarter Farms) containing 550 acres, more or less, a description of which is attached to this judgment marked Exhibit A, and included by reference as a part of this paragraph of this judgment. *The only exception to the absolute ownership of Mary Sue Price in and to said Paradise Farms (sometimes known as the Hamilton Quarter Farms) containing 550 acres, more or less, is a fourteen (14) acre tract to be surveyed off and owned in fee simple by Sevil Horn. This fourteen acre tract shall be surveyed off so that it contains one barn and*

no other structures of any kind and should be located as follows: TO BE SURVEYED." (Emphasis supplied.)

2. Horn and wife to convey to Price their interest in the 550-acre tract.

3. Mary Price and husband to convey to Horn the 14-acre tract contemporaneously with judgment or as soon thereafter as a proper description can be obtained.

4. Mary Price and husband to convey other properties listed in will to Horn.

5. Jacobs and wife to execute to Horn and wife certain property listed in will.

6. Basil Price and wife to convey to Horn and wife certain property listed in will.

7. Cecil Price to convey to Horn and wife certain property listed in will.

"8. That Sevil Horn, as of this date, shall resign as Executor of the estate of Basil C. Horn, deceased, and shall, within the next 10 days, file with the Clerk of the Superior Court of Rutherford County, North Carolina, an accounting of his transactions as Executor up to and including this date which shall be the date of his resignation."

"9. That the Clerk of the Superior Court of Rutherford County, North Carolina, shall forthwith appoint an Administrator C.T.A. to complete the administration of the estate of Basil C. Horn, deceased. All parties hereto have agreed to recommend to the Clerk that he appoint Mary Sue Price, the only child of Basil C. Horn, deceased, as Administratrix, C.T.A. to complete the administration of his estate."

"12. . . . *Sevil Horn shall be solely responsible for the payment of all penalties and interest, if any, which shall be finally adjudicated to be due the Government of the United States or the State of North Carolina on account of any act or failure to act on the part of Sevil Horn in connection with the management of the Estate of Basil C. Horn, deceased, or in connection with the discharge of his duties as Executor of the Estate of Basil C. Horn, deceased.* Sevil Horn and his attorney shall have the right to contest

> the assessment and collection of all penalties and interest as provided by law. *The property of Sevil Horn shall be solely liable as between the parties hereto for the payment of said penalties and interest,* and in the event that Sevil Horn and his attorney elect to contest the assessment and enforcement of any and all said penalties and interest, the *said Sevil Horn shall put up, make available, or pledge enough of the property acquired from the estate of B. C. Horn to the Federal Government and State Government to release the tax lien against property of the other devisees.*" (Emphasis supplied.)

This judgment was entered 14 September 1972. On 24 October 1974, the present action was instituted by Mary Sue Price, Administratrix d/b/n c/t/a, alleging that during the administration of the estate of B. C. Horn by Sevil Horn, acting as Executor under the will, no estate or inheritance tax returns had been filed and no tax paid; that plaintiff had filed the returns and paid the taxes due; that all persons receiving property of Basil C. Horn had furnished plaintiff administratrix with funds with which to pay their pro rata share of the federal estate tax and North Carolina inheritance tax except Sevil Horn and wife, Nell Horn; *that Sevil Horn and Nell Horn did pay certain taxes due the Internal Revenue Service and the North Carolina Department of Revenue but they had failed and refused to pay penalties and interest due by reason of Sevil Horn's failure to file the returns and pay the taxes due while acting as Executor;* that the amounts thus due constitute liens upon all land received by Sevil Horn and Nell Horn which belonged to Basil C. Horn at the time of his death whether received by the terms of the will or under the consent judgment filed 14 September 1972. A schedule, denominated Schedule "C," was attached to the complaint and contained a list of properties received by the Horns under the will and under the consent judgment and included "14 acres of land as described in a deed from Mary Sue Price and husband, Kenneth Price to Sevil Horn and wife, Nell Horn." Plaintiff asked that she, as administratrix, recover the sum of $8,640.27 plus all additional penalties and interest assessed by the United States or the State of North Carolina; that a commissioner be appointed to sell the lands described in Exhibit "C" for the purpose of paying the penalties and interest; and for other relief, including injunctive relief.

On 18 February 1975, Sevil Horn answered denying that he had failed to file the estate tax return and the inheritance tax return; denying that by reason of his failure large amounts of penalty and interest are chargeable to the estate for which he was personally liable; *denying that any penalties are due but admitting that interest is due;* denying that any amounts due either the United States or the State or North Carolina constituted liens against property coming to him either under the will or through the agreement; denying that plaintiff is entitled to recover the amount prayed for and denying that it is necessary to sell the lands described in Exhibit "C." By way of "FURTHER ANSWER, DEFENSE and Counterclaim" he averred that Mary Sue Price had failed to convey to him the 14-acre tract as provided in paragraph 1 of the consent judgment and had "obstructed and prevented the establishment of a line on the said Fourteen (14) acre tract"; that in view of her refusal to convey that tract, he has no obligation to pay the interest due on the tax. He prays for an order requiring Mary Sue Price and Kenneth Price "to execute the deed for the Fourteen (14) acres, according to his survey" and for recovery of $25,000 damages.

Plaintiff, by reply to the "FURTHER ANSWER, DEFENSE and Counterclaim," alleged that Sevil Horn and his counsel had caused a survey of the land to be made and a map thereof delivered to counsel for plaintiff; that upon inquiring of the surveyor it was determined that the tract Sevil Horn had blocked out contained in excess of 17½ acres but the amount of acreage had been deleted from the map provided for a description; that plaintiff thereafter tendered to Sevil Horn a deed for 14 acres as required by the consent judgment.

Plaintiff then filed motion for summary judgment, supported by her verified complaint, testimony of agents of North Carolina Department of Revenue and the Internal Revenue Service and certain letters from the taxing authorities advising the amount of tax, interest and penalties.

On 2 May 1975, Judge Friday entered an order reciting that the matter having come before him for hearing "and the court having ordered a survey of the property in dispute and the surveyor having advised the court that he will need additional time to complete his work," the matter was continued to 12 May 1975 at which time the court would hear additional evidence and review the survey and enter the necessary judgment.

On 14 May 1976, the court entered summary judgment for plaintiff. The record does not indicate that defendant presented any documents or evidence in opposition to the motion filed by plaintiff. The court set out the undisputed facts: that no penalties were due, but that interest in the total amount of $8,930.37 was due; that all other taxes as required by the consent judgment had been paid; that plaintiff was required by the judgment to convey 14 acres of land to the defendants "said tract to be located as follows: 'To Be Surveyed'"; that plaintiff tendered a deed and survey but defendant refused to accept it; that defendants tendered a deed to be executed for in excess of 14 acres and plaintiff refused to execute the deed; that the court ordered a survey; that the survey had been completed and the plat of the survey was incorporated as a part of the judgment (and a description therefrom was made a part of the judgment); that Sevil Horn has refused to pay the interest as required by the consent judgment; that notice of lis pendens had been filed by plaintiff; that the consent judgment provided for the sale of defendant's land to obtain funds with which to pay the amounts for which he was liable. The court made the following conclusions of law:

> "1. That there is no genuine issue as to any material fact and plaintiff is entitled to Judgment as a matter of law.
>
> 2. That the defendant, Sevil Horn, is indebted to Mary Sue Price as Administratrix of the Estate of Basil C. Horn, deceased, in the amount of $8,930.37 for payment of Federal and State Inheritance Tax and interest as provided by Judgment attached hereto.
>
> 3. That Mary Sue Price, Administratrix d/b/n/c/t/a of the Estate of Basil C. Horn, deceased, is authorized to sell the property of Sevil Horn which was conveyed to the said Sevil Horn pursuant to the terms of Consent Judgment attached hereto to pay interest and taxes to the North Carolina Department of Revenue and The Internal Revenue Service in the amounts herein set forth."

Upon those conclusions the court ordered that plaintiff recover of defendant $8,930.37 and costs; that plaintiff convey the 14 acres as described in the judgment to Sevil Horn; that plaintiff be appointed commissioner to sell any and all real estate conveyed to Sevil Horn from the estate of Basil C. Horn

at public auction and apply the proceeds first to the payment of costs, then to the payment of the $8,930.37.

From the judgment defendants appealed.

Hamrick, Bowen and Nanney, by Fred D. Hamrick, Jr., for plaintiff appellee.

Hamrick and Hamrick, by J. Nat Hamrick, for defendant appellants.

MORRIS, Judge.

Defendants, maintaining that the trial court erred in granting plaintiff's motion for summary judgment, essentially contend that plaintiff Mary Sue Price, in failing to convey to defendant Sevil Horn the 14-acre tract surveyed off by Sevil Horn, breached a contractual condition precedent, relieving defendant Sevil Horn of any liability and accountability for his nonpayment of certain extra tax obligations charged against the decedent's estate. We disagree.

The consent judgment is a contractual agreement and "[i]ts meaning is to be gathered from the terms used therein, and the judgment should not be extended beyond the clear import of such terms. . . . " 47 Am. Jur. 2d, Judgments, § 1085, p. 142. Also see: 47 Am. Jur. 2d, Judgments, § 1082; 5 Strong, N. C. Index 2d, Judgments, §§ 8, 10; *Sawyer v. Sawyer*, 4 N.C. App. 594, 167 S.E. 2d 471 (1969). However, to interpret the nature and import of the consent judgment more precisely, courts are not bound by the "four corners" of the instrument itself. The agreement, usually reflecting the intricate course of events surrounding the particular litigation, also should " . . . be interpreted in the light of the controversy and the purposes intended to be accomplished by it." 5 Strong, N. C. Index 2d, Judgments, § 10, p. 22.

[1] We have, therefore, reviewed the operative provisions of this consent judgment in terms of contractual analysis and construction, and we cannot find any condition precedent to defendant Sevil Horn's personal responsibility for the interest and penalty payments assessed against the decedent's estate. To have recognized a condition precedent would have required liberal construction and the broadcast of critical readings and, as noted by Judge Parker in *Financial Services v. Capitol Funds*, 23 N.C. App. 377, 386, 209 S.E. 2d 423 (1974), aff'd. 288 N.C.

122 (1975), "[c]onditions precedent are not favored in the law and provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such contruction." Neither the actual terms of this consent judgment nor the overall context indicates any pre-condition to defendant's duty to pay the tax obligations, and we are not prepared to supply so important a term in the absence of at least a modicum of plain and unequivocal language indicating that such a condition precedent was intended. We hold, therefore, defendants' position on this question to be without merit.

[2] Defendants also argue that the trial court, by improperly disposing of the case by summary judgment, denied them the right to a trial on the issues raised in their counterclaim. We, again, find no merit to this contention.

Defendants failed to present any documentation or evidence in opposition to plaintiff's motions. " . . . [A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." G.S. 1A-1, Rule 56(e); also see *Patterson v. Reid,* 10 N.C. App. 22, 178 S.E. 2d 1 (1970). Our study of the record results in the conclusion that the entry of summary judgment for plaintiff was appropriate under all the circumstances of this case. It should be noted that defendants' claim for $25,000 damages was not disposed of in the trial court's entry of judgment, and defendants' cause of action for money damages has not been prejudiced or resolved. On the other hand, the court-ordered survey of a 14-acre tract was not improper and merely served to expedite the resolution of the determination of what land plaintiff was obligated to convey to defendants under the consent judgment, the terms of which, as to this land, were so vague that a court-ordered survey would be, in all probability, the only means of resolving the interpretation of the phrase "To Be Surveyed." See G.S. 1A-1, Rule 70. Cf: *Elliott v. Burton,* 19 N.C. App. 291, 198 S.E. 2d 489 (1973). Plaintiff has, at all times, admitted that she is obligated to convey to defendant 14 acres of land. Once the trial court determined that there was no genuine issue of material fact with respect to defendant Sevil Horn's duties under the consent judgment, it simply and properly went forward to require plaintiff's conveyance of a

14-acre tract and further provided that, pursuant to the consent judgment, the administratrix, acting as commissioner, could sell the property to satisfy the defendant Sevil Horn's debt due to the respective governmental revenue agencies.

Affirmed.

Judges VAUGHN and CLARK concur.

JOSEPH D. WILLIAMS II, MINOR, BY GUARDIAN AD LITEM, JOSEPH D. WILLIAMS v. WACHOVIA BANK AND TRUST COMPANY, EXECUTOR OF ESTATE OF JOHN WALDROP WILLIAMS

JOSEPH D. WILLIAMS, INDIVIDUALLY v. WACHOVIA BANK AND TRUST COMPANY, EXECUTOR OF ESTATE OF JOHN WALDROP WILLIAMS

No. 763SC15

(Filed 7 July 1976)

1. **Automobiles § 108— family purpose doctrine**

The family purpose doctrine renders the owner or person with ultimate possession and control of a vehicle liable for its negligent operation by another, provided (1) the operator is a member of the family or household of the owner or person with control and is living at home; (2) the vehicle involved in the accident is a family vehicle and is owned, provided and maintained for the general use, pleasure and convenience of the family; and (3) the vehicle is being used by a member of the family with the consent, knowledge, and approval of the owner or person in control at the time of the accident.

2. **Automobiles § 108— motorbike operated by minor on private property — no family purpose vehicle**

A motorbike operated by an unlicensed minor exclusively on private property was not a "family purpose" vehicle in view of the the original purpose and scope of the family purpose doctrine.

APPEAL by defendant from *Lanier, Judge.* Judgment entered 15 September 1975 in Superior Court, PITT County. Heard in the Court of Appeals 3 May 1976.

This appeal stems from an accident involving the minor plaintiff, Joseph D. Williams II, and Johnathan David Williams, the son of John Waldrop Williams, now deceased. The executor

of John Waldrop Williams' estate, Wachovia Bank and Trust Company, is the sole defendant in this case.

On 28 December 1973 the minor plaintiff, through his father as guardian ad litem, instituted a civil action against defendant based upon the following allegations.

> "That on or about May 5, 1972, Johnathan Davis Williams, operating a 1971 Honda Motorcycle, Serial No. SL100203264, while traveling west on the shoulder of Fairlane Road between Hooker Road and St. Andrews Street in the City of Greenville, County of Pitt, North Carolina, negligently ran into and collided said motorcycle with the person of Joseph D. Williams, II producing severe pain and personal injuries to him.
>
> "That the 1971 Honda Motorcycle, Serial No. SL100203264 was a family purpose vehicle owned by the defendant, John Waldrop Williams, and said motorcycle was intended for the convenience and pleasures of his family and that Johnathan Davis Williams is the son of John Waldrop Williams and said son was living with the defendant herein as a member of his household at the time of the collision.
>
> "That defendant was negligent in that his agent under the family purpose doctrine saw, or by the exercise of reasonable care, should have seen said child on or near the shoulder of the said street and defendant failed to maintain a vigilant lookout, give a timely warning of his approach, and to drive at such speed and in such manner that he could control said motorcycle if plaintiff herein, in obedience to a childish impulse, attempted to cross in front of defendant's approaching motor vehicle.
>
> "That the negligence of the defendant's agent as aforesaid was the sole and proximate cause of said personal injuries."

The minor plaintiff prayed for damages of $25,000.00.

Joseph Williams' father and guardian ad litem filed a separate complaint based upon identical allegations to recover medical expenses and loss of income resulting from his son's injuries.

The evidence tends to show the following: At the time of the accident, Johnathan David Williams was fourteen years old. His father had recently purchased a Honda SL 100 motorcycle for his use and enjoyment. The SL 100 is a slightly larger version of the Honda Mini-Trail 50—the type of motorbike Johnathan Williams had before the SL 100. The SL 100 has an eleven horsepower engine. He testified that he knew that neither the SL 100 nor the Mini-trail 50 was a licensed vehicle: "I knew it was against the law to ride them on the highway. I never rode the bike on the highway or hard surfaced road."

Normally after school Johnathan would ride his motorbike in a vacant lot on Memorial Drive, where the Putt-Putt used to be, and in a tobacco field at the end of Fairlane Road. He was living with his family at 111 Fairlane Road at the time of the accident. The house was located directly across the street from the minor plaintiff's residence. According to Johnathan's testimony,

> "[t]o get to either the Putt-Putt or to the tobacco field, I would go to the end of the driveway and go either left or right. The vacant field on Memorial Drive was west and the tobacco field was east. To get to either of these places, no, I didn't have to go through the Williams' yard, but occasionally I did, a couple of times. . . .
>
> . . . .
>
> "I would ride along yards or through particular yards in order to avoid riding on the hard surfaced road. I would ride on the side of the road rather than on the road because if you ride on the road and a policeman comes along, you are in for it. I knew there was some reason not to ride on the road, and that is the reason I rode on the side. In fact I did ride in the yards; at the edge of the yard, but in the yard and not on the road."

In the late afternoon of 5 May 1972, while riding west through the yard of Joseph D. Williams, ten to twelve feet from the road, at a speed of about fifteen miles per hour, Johnathan struck the minor plaintiff with his motorbike. According to his testimony,

> "I was riding down through the yard in front of their yard. There was a vacant lot beside of their house when this happened but there is a house there now. Al Cayton was in

front of me, and he had his little brother which was about 2 or 3 years old riding with him, in front of him, and he went on down the road. He was about 40 feet in front of me and we were both just taking it easy. I was riding about 15 miles an hour with a tinted face shield over my helmet.

"When I got to the end of their lot I saw the boy and his sister come running out of the street from, it looked like my neighbor's yard across the street—come running out of their driveway. There was a bush there that blocked—you know, I couldn't see them from the bush until they got out in the street.

"When I saw them I hit my back brake and hit the horn. The little girl got out of the way and the little boy came in front of me. He was about 5 or 6 feet right dead in front of me. The little girl called him; I guess she called him. Anyway he stopped right in front of me for a dead split second and then he ran back towards his sister so I, instead of stopping completely—if I had stopped completely I would have stopped right on top of him, so I just kept on going and hit the brake and slid over to the right trying to avoid him—both of them—and the bike slid down with me.

"The front fork—its got a brace on it which hit his head and knocked him down—that is what caused the injury.

"As soon as I saw him coming out of the street—as soon as I saw him, I hit the horn and the brake. They were running, coming out of the street. In my opinion they were about 15 or 20 feet away from me when I hit the brake. I hit the brake hard and it locked—the back wheel locked, 15 feet away, some 5 yards away from the children.

"I saw them coming out of the driveway across the street from another neighbor's yard. The first time I saw them they were in the middle of the street as if they had come out of another driveway. That street is about 19 feet wide. They were about 10 feet out in the street."

The minor plaintiff was promptly taken to the hospital and treated for head injuries.

Mrs. Joseph Williams, the minor plaintiff's mother, testified that there was a path running parallel to the road in the

front portion of their yard; she had seen Johnathan Williams and others ride motorbikes along the path in the past; and after observing Johnathan riding around a pine tree on their property on one occasion, she asked him not to ride in the yard.

Defendant offered no evidence and, at the conclusion of plaintiff's evidence, moved for directed verdicts on the grounds: (1) that the evidence offered by plaintiff in each case fails to show actionable negligence on the part of the defendant; and (2) that "the evidence failed to disclose or reveal that the accident complained of occurred on a public roadway or highway and on account thereof, the Family Purpose Doctrine would not apply and that any negligence found on the part of the operator of the SL 100 Honda vehicle, to wit: David Williams would not be imputed to John Waldrop Williams, the owner thereof."

Both motions were denied by the court. The jury returned verdicts in favor of both plaintiffs.

Defendant appealed.

James, Hite, Cavendish & Blount, by Robert D. Rouse III, for the plaintiffs.

Gaylord, Singleton & McNally, by Phillip R. Dixon, for the defendant.

BROCK, Chief Judge.

The controlling question on appeal is whether the family purpose doctrine applies to Johnathan Williams' operation of the motorbike in this case. Assuming that there is sufficient evidence to submit the question of Johnathan Williams' negligence to the jury, plaintiff's sole basis for recovering against the estate of Johnathan Williams' father, the only defendant in this case, is the family purpose doctrine.

[1] The family purpose doctrine renders the owner or person with ultimate possession and control of a vehicle liable for its negligent operation by another, provided (1) the operator is a member of the family or household of the owner or person with control and is living at home; (2) the vehicle involved in the accident is a family vehicle and is owned, provided and maintained for the general use, pleasure and convenience of the family; and (3) the vehicle is being used by a member of the family with the consent, knowledge and approval of the owner

or person in control at the time of the accident. *Lynn v. Clark,* 252 N.C. 289, 113 S.E. 2d 427 (1960).

In *Grindstaff v. Watts,* 254 N.C. 568, 119 S.E. 2d 784 (1961), our Supreme Court held that the family purpose doctrine does not apply to motorboats:

> "In the absence of legislative action, this Court is not disposed to extend the family purpose doctrine in North Carolina to instrumentalities other than motor vehicles operating on public highways. Should the principles of *respondeat superior* be further relaxed, great uncertainty will exist in the field of agency and there will be an immediate clamor to extend the doctrine to still other instrumentalities to meet the exigencies of particular cases. [Citation omitted.]"

The *Grindstaff* case clearly discourages the extension of the doctrine beyond its original purpose and scope. To quote again from *Grindstaff* at page 572:

> "The family purpose doctrine 'came into being as an instrument of social policy to afford greater protection for the rapidly growing number of motorists in the United States.' 38 N.C. Law Review 252-3. Perhaps nothing has had so great an impact on the business and social life of this country during the past half century as the advent and ever increasing use of automobiles and trucks. It was probably inevitable that there should be an alarming number of collisions and accidents resulting in injuries, suffering and economic loss. This possibly justified the search of the courts for some device to impose a greater degree of financial responsibility. On the other hand, the fact cannot be ignored that a majority of the jurisdictions have managed somehow without the family purpose doctrine. It is certain that the courts in the adopting States have been exceedingly reluctant to broaden its scope or to extend it to other instrumentalities."

[2] Although a motorbike is a "motor vehicle" which could be operated on public highways by a licensed operator, the motorbike in this particular case was intended for use by an unlicensed minor driver off the public highways and, in fact, was used exclusively in this manner. For the same reasons articulated in *Grindstaff,* we are reluctant to stretch the family pur-

pose doctrine to the circumstances of this case. In our opinion the motorbike operated by Johnathan Williams exclusively on private property is not a "family purpose" vehicle in view of the original purpose and scope of the family purpose doctrine.

If negligence is to be imputed to the head of the household for the operation by family members of instrumentalities other than motor vehicles used in public vehicular areas, we think it is the function of the Legislature to determine the instrumentalities to be included. We should not have the uncertainty attendant upon the Court's extension of the family purpose doctrine on a piecemeal basis to meet the exigencies of particular cases.

The denials of defendant's motions for directed verdicts were error. The judgment appealed from is reversed; the verdicts are set aside; and this cause is remanded for entry of judgment for directed verdict for defendant in each case.

Reversed and remanded.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, AND CAROLINA TELEPHONE AND TELEGRAPH COMPANY v. COUNTY OF HARNETT, INTERVENOR

No. 7610UC256

(Filed 7 July 1976)

Telephone and Telegraph Companies § 1; Utilities Commission § 7— telephone general rate case — claim for extended area service

In a telephone general rate case, the Utilities Commission was not required to consider and pass upon the intervenor county's claim that it was entitled to have extended area service connecting the county seat exchange with other exchanges serving telephone customers in the county, since such relief should be sought in a complaint case authorized by G.S. 62-73 rather than in a general rate case under G.S. 62-133.

APPEAL by County of Harnett, Intervenor, from order of North Carolina Utilities Commission entered 24 October 1975. Heard in the Court of Appeals 16 June 1976.

This general rate case was commenced 20 December 1974 when Carolina Telephone and Telegraph Company (hereinafter referred to as Carolina Telephone) filed its application with the North Carolina Utilities Commission for approval of increases in its rates and charges for intrastate telephone services sufficient to produce approximately $12,900,000.00 in additional annual gross revenues. Carolina Telephone is a franchise public utility which furnishes telephone service in all or part of thirty-eight (38) counties in Eastern North Carolina, its service area covering approximately thirty (30%) percent of the geographical area of this State. By this appeal the appellant, County of Harnett, seeks to raise questions concerning Carolina Telephone's services in only one county of its service area, Harnett County.

On 9 January 1975 the Commission entered its order declaring this proceeding to be a general rate case under G.S. 62-133, suspending the proposed rate increases, and directing Carolina Telephone to give its customers notice of a hearing before the Utilities Commission to be held beginning 17 June 1975. By subsequent order the Commission rescheduled the hearing to begin on 9 September 1975.

On 28 August 1975 the County of Harnett filed its petition to intervene in this proceeding, alleging that it is a customer of Carolina Telephone and that as a customer is directly affected by the proposed rate increase. Carolina Telephone did not oppose the petition to intervene, and by order filed 3 September 1975 the Commission allowed the petition and designated Harnett County as an Intervenor in this proceeding.

Also on 28 August 1975 Harnett County filed a motion for an order to require Carolina Telephone to answer certain interrogatories and to furnish certain documents and data. By order dated 4 September 1975 the Commission denied the motion but did direct Carolina Telephone to provide the Intervenor with a copy of its verified application for the general rate relief and copies of all pre-filed testimony and exhibits of the applicant's witnesses.

Hearings were held before the Utilities Commission on the application for a general rate increase from 9 September through 12 September and from 16 September through 19 September 1975. During these hearings the Intervenor, County of

Harnett, presented evidence and exhibits to show the following:

Telephone service is furnished to the residents of Harnett County through six exchanges, each of which serves a different area of the county. Three of these exchanges are owned and operated by the applicant, Carolina Telephone, and the remaining three are owned and operated by two other telephone companies. Of the three exchanges operated by the applicant, two, being the exchanges at Lillington and at Dunn, are located within Harnett County, while the third exchange, which serves the telephone customers in the southern portion of Harnett County and customers in Cumberland County, is located at Spring Lake in Cumberland County. None of the six exchanges through which telephone service is furnished to customers in Harnett County is connected with any of the other of such exchanges by extended area service (EAS). The result is that a customer of one exchange can call a customer of another exchange serving a different area of Harnett County only by paying a toll for each such call. Only those customers whose phones are connected with the Lillington exchange can call toll free the county offices which are located at the county seat in Lillington. Likewise, the Intervenor, County of Harnett, which serves citizens throughout the entire county through its Sheriff's Department, Health Department, and approximately fifteen other departments, must pay a toll in order to telephone any of its citizens living outside of the area served by the Lillington exchange.

At the conclusion of the hearings, the Intervenor, County of Harnett, filed motions asking (1) that the Utilities Commission, in its order to be issued in this Docket, make findings of fact in conformity with the foregoing evidence and that it conclude therefrom as a matter of law that the rate increase requested by Carolina Telephone provides less benefit to the County of Harnett than to other counties served by Carolina Telephone because of the multiple exchanges that exist in Harnett County, and (2) that the areas served by the Dunn, Lillington, and Spring Lake exchanges of Harnett County be granted extended area service as a benefit for any rate increase allowed by the Utilities Commission. The Commission denied both motions.

On 24 October 1975 the Commission entered its final order in this general rate case in which it made findings of fact and

conclusions of law (which did not include the findings requested by the Intervenor, County of Harnett), on the basis of which it authorized Carolina Telephone to increase its intrastate telephone rates and charges to produce additional annual gross revenues not to exceed $9,018,860.00, based upon stations and operations as of 31 December 1974, the end of the test year. From this order the Intervenor, County of Harnett, appeals.

Joyner & Howison by R. C. Howison, Jr., and Edward S. Finley, Jr., and Taylor, Brinson & Aycock, by William W. Aycock, Jr., for Carolina Telephone and Telegraph Company, appellee.

Commission Attorney Edward B. Hipp and Assistant Commission Attorneys Robert F. Page and Dwight W. Allen for North Carolina Utilities Commission, appellee.

Woodall & McCormick by Edward H. McCormick for County of Harnett, appellant.

PARKER, Judge.

The question presented by this appeal is whether the Utilities Commission was required, in this general rate case, to consider and pass upon appellant's claim that it was entitled to have extended area service (EAS) connecting applicant's Lillington exchange with other exchanges serving telephone customers throughout Harnett County. We hold that it was not.

No question is raised that this is a general rate case under G.S. 62-133 and that it was properly so declared by the Utilities Commission pursuant to the authority granted it by G.S. 62-137. It was, therefore, necessary for the Commission in this proceeding to follow the steps and to make the determinations required by G.S. 62-133, in so doing applying the principles set forth in the opinion of our Supreme Court in *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972). In performing the important function assigned to it by statute of fixing "such rates as shall be fair both to the public utility and to the consumer," G.S. 62-133(a), it was necessary for the Commission in this proceeding, as in other general rate cases, to consider and evaluate voluminous testimony and exhibits and to make the many difficult value judgments which are necessarily involved in following the steps mandated by G.S. 62-133. Neither the present appellant, the County of Har-

nett, nor anyone else affected by the Commission's final order, has raised any question by appeal to this Court concerning the procedures followed by the Commission in arriving at its ultimate determination as to fair rates in this case.

By intervening in this case the County of Harnett, as a telephone customer of Carolina Telephone, did not oppose an increase in the rates to be allowed Carolina Telephone for the services which it was rendering and which it proposed to continue to render in Harnett County. Rather, appellant's purpose was to obtain an order of the Commission which would require Carolina Telephone to provide EAS connecting its exchange serving the county seat at Lillington with its other exchanges serving telephones in Harnett County. It is, of course, easy to understand the legitimate interest which the County of Harnett, both as a governmental entity and as a telephone customer, has in obtaining toll free telephone communication between its offices in the county seat and the telephones of its citizens living throughout the county. We hold, however, that the Utilities Commission was not required to determine in this, a general rate case, rights which appellant asserts are peculiar to it and to other telephone customers in Harnett County because of the special circumstance that multiple exchanges exist in that county.

The rights which appellant seeks to assert and the relief which it hopes to attain would be more appropriate to a complaint case authorized by G.S. 62-73 than to a general rate case under G.S. 62-133. The difference in the two types of cases and the reasons why the Commission should have broad discretion to refuse to hear in a general rate case matters which would more appropriately be considered in a complaint case, were clearly pointed out by our Supreme Court in the opinion in *Utilities Commission v. Gas Co.*, 259 N.C. 558, 131 S.E. 2d 303 (1963), as follows (pp. 562, 563):

> "In a complaint case the field of inquiry is limited to the comparatively narrow question of fair treatment to a group or to a class. Necessarily the Commission must be given broad discretion with respect to the extent which it will hear evidence relating to a particular schedule when the basic question for consideration is: Does the utility need an increase in rates to function effectively or, conversely, can the utility continue to operate, provide effi-

cient service to its customers, and make a fair return to the owners of its properties, or may it so function after a reduction in rates? *Utilities Comm. v. Area Development, Inc.*, 257 N.C. 560, 126 S.E. 2d 325; *Utilities Comm. v. Light Co., supra.*

To require the Commission in a general rate case to go into minute details with respect to each of the proposed increases and the possible inequalities which might be created thereby would distract its attention from the crucial question, namely: What is a fair rate of return on company's investment so as to enable it by sound management to pay a fair profit to its stockholders and to maintain and expand its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise?"

We note from the statement contained in appellant's brief that as a result of separate proceedings initiated by the Utilities Commission after entry of its final order in this case, the Commission entered an order on 15 March 1976 directing interconnecting service between Carolina Telephone's Lillington and Dunn exchanges. Appellant acknowledges that to this extent its present appeal is moot.

We find no abuse of the Commission's discretion in refusing to pass upon appellant's asserted rights to further EAS in this general rate case, and the order appealed from is

Affirmed.

Chief Judge BROCK and Judge ARNOLD concur.

B. E. COMBS, ADMINISTRATOR C.T.A. OF THE ESTATE OF KYLE C. ELLER, JR., PETITIONER v. ELIZABETH M. ELLER, FRANKLIN H. ELLER, TRUSTEE UNDER THE WILL OF KYLE C. ELLER, JR., AND MARVIN V. BONDURANT, GUARDIAN AD LITEM FOR KYLE C. ELLER III, CHARLES I. ELLER AND WILLIAM R. ELLER, MINORS, RESPONDENTS

No. 7622SC160

(Filed 7 July 1976)

1. **Executors and Administrators §§ 13, 18— liability of estate assets for estate obligations — direction by testator**

   Direction from a testator that certain property in the estate not be applied to the payment of estate liabilities cannot operate to prevent the payment of debts, taxes and costs of administration which are justly owed.

2. **Executors and Administrators § 6; Wills § 31— life insurance — entirety property — liability for estate's obligations**

   Life insurance proceeds and entirety property passed to testator's wife outside his estate and were not liable for payment of the estate's liabilities.

3. **Gifts § 4; Executors and Administrators § 6— gift in contemplation of death — liability for estate obligations**

   Where testator's transfer of his interest in a joint savings account and joint savings certificate was a valid gift in contemplation of death, those assets were not available to pay the liabilities of the estate until the estate's assets were exhausted.

4. **Executors and Administrators § 14— sale of trust assets to pay liabilities**

   Where all that remained to pay the liabilities of an estate after the exhaustion of general and residuary bequests to testator's wife was corporate stock bequeathed in trust for testator's sons, the court properly ordered a sale of the stock to pay estate liabilities notwithstanding testator directed that the stock not be used to pay obligations of the estate.

5. **Executors and Administrators § 14— sale of all trust stock when only portion needed to pay debts**

   While only a portion of stock of two corporations bequeathed in trust for testator's sons was needed to pay liabilities of the estate, the court properly ordered a sale of all of the stock where the court found that neither of the stocks had ever paid a dividend or was likely to pay a dividend in the future and that a sale of any of the stock of either corporation would render the trustee a minority shareholder in such corporation.

APPEAL by respondent, Marvin V. Bondurant, from *Collier, Judge.* Judgment entered 12 February 1976 in Superior Court, IREDELL County. Heard in the Court of Appeals 27 May 1976.

This is a civil action for declaratory judgment wherein the petitioner, B. E. Combs, Administrator c.t.a. of the Estate of Kyle E. Eller, Jr., is seeking instructions from the court regarding his rights and duties under the will of testator who died 10 February 1975.

Petitioner alleged in pertinent part the following:

Kyle Eller, Jr., died on 10 February 1975 leaving a last will and testament dated 16 May 1966. The will disposes of his estate by leaving household goods, furnishings, fixtures, appliances and other items along with the residue of his estate to his wife. The remainder of his estate, all of his stock in Interstate Equipment Company and Allstate Equipment Company, which represents fifty percent of the stock in each of the corporations, is bequeathed to Franklin H. Eller in trust for the sons of testator. The will directs that petitioner is *not* to use any of the stock to pay the obligations of the estate including taxes, costs of administration, and testator's debts, but that he has the duty to transfer the stock in full to the Trustee. He is directed to pay the liabilities of the estate out of the residuary and general bequests to his wife.

In addition to assets passing under will, there passed to testator's wife by operation of law or contract outside the will certain life insurance proceeds, real estate owned as tenants by the entirety, the balance of a savings account and a savings certificate, all of which are included in the estate for North Carolina Inheritance Tax and Federal Estate Tax purposes. The savings account and savings certificate had been held jointly with his wife as provided by G.S. 41-2.1, but testator transferred all his interest in them three days prior to his death.

The total liability of testator's estate—costs of administration, taxes, and testator's debts—amounts to $199,602.57. The value of property in the general and residuary bequests to testator's wife is only $82,830.19, leaving a deficit of $116,772.38. Testator's interest in the stock of Allstate Equipment Company and Interstate Equipment Company is valued at $398,815.20. It is petitioner's opinion that the property passing outside the will is not available to pay the debts of the estate and that it will be necessary to sell part of the stock to pay the estate's liabilities.

The stocks have never paid a dividend nor is one probable in the future. The corporations which issued the stock have not elected to be treated as Subchapter S corporations under the Internal Revenue Code nor is such election expected in the future. If sale of part of the stock is authorized to pay estate liabilities, the Trustee will control less than fifty percent of the stock of either one or both corporations. In petitioner's opinion, it will be in the best interest of the beneficiaries of the trust to sell all the stock in the corporations and pay the proceeds over to the Trustee to be invested as provided by law.

Based on the above allegations, petitioner requested instructions as to whether he may sell part of the stock to pay the liabilities of the estate, whether any of the property passing outside the will is available to pay the estate's obligations and if so in what priority they should be applied, and whether he may sell all the stocks and pay the cash proceeds over to the Trustee.

Marvin V. Bondurant, Guardian ad Litem for the three minor children, answered the petition denying that the life insurance proceeds, real estate owned as tenants by the entirety, the savings account, and the savings certificate which passed by operation of law and contract outside the will were not available to pay the liabilities of the estate. He also denied that it was necessary to sell part of the testator's stock to pay the estate's liabilities. Respondent did agree, however, that all of testator's interest in the stock of the corporations should be sold, but he contended that *all* the proceeds should be given to the Trustee to invest.

After a hearing on the matter, Judge Collier found that the savings account and savings certificate were valid transfers in contemplation of death and not available to pay the liabilities of the estate under G.S. 41-2.1. The life insurance proceeds and real estate owned by the entireties were likewise not available to pay the liabilities of the estate.

Judge Collier concluded that the personal estate must be exhausted before any property passing by operation of law or contract outside the will could be applied to payment of the estate's liabilities. He also concluded that the best interests of the beneficiaries of the trust required that all the stock be sold and the proceeds remaining, if any, after all the liabilities of the estate were satisfied should be paid to the Trustee.

An order was entered directing petitioner to sell all the stock and to first apply the proceeds to satisfy the remaining liability of the estate should they be so needed and to pay the remainder over to the Trustee. Respondent appealed.

Raymer, Lewis, Eisele and Patterson by Douglas G. Eisele for petitioner appellee.

No counsel for respondent appellant.

HEDRICK, Judge.

We are first asked to determine whether the court erred in ordering a sale of the stock in order to pay the remaining liabilities of the estate after the general and residuary bequests to testator's wife had been exhausted.

[1] Testator directed in his will that the property in the residuary and general estates be applied to payment of the estate's liabilities and specifically directed that the bequest to the Trustee *not* go to payment of the liabilities of the estate. The liabilities of the estate total $199,602.57 and the property in the residuary and general estates have a value of only $82,830.19 leaving a deficit of $116,762.38. It is axiomatic that a testator has nothing to give away until his debts have been paid and the obligations of the estate have been fulfilled. *In re Estate of Bost,* 211 N.C. 440 (1937); *Trust Co. v. Lentz,* 196 N.C. 398 (1928). It is also clear that the direction from the testator that certain property in the estate not be applied to payment of estate liabilities cannot operate to prevent payment of debts, taxes and costs of administration which are justly owed. See *Hedrick v. Hedrick,* 214 N.C. 692 (1939). Equity and the law "require that a man shall be just before he is generous, for generosity ceases to be a virtue when indulged in at the expense of creditors." *Trust Co. v. Lentz, supra* at 404.

[2] The life insurance proceeds and the real property owned as tenants by the entirety passed to testator's wife outside the estate. *Isaacs v. Clayton,* 270 N.C. 424, 154 S.E. 2d 532 (1967); *Honeycutt v. Bank,* 242 N.C. 734, 89 S.E. 2d 598 (1955). At the time of death, they are not property owned by the testator and are not ordinarily liable for payment of the estate's liabilities. *Isaacs v. Clayton, supra; Honeycutt v. Bank, supra.*

[3, 4] The court's finding that testator's transfer of his interest in the savings account and certificate was a valid gift in

contemplation of death supports the conclusion that those assets are not available to pay the liabilities of the estate until the estate's assets are exhausted. *See* 33 C.J.S., Executors and Administrators, § 123, p. 1076. All that remains to pay the liabilities of the estate after exhausting the general and residuary bequests to testator's wife is the stock in the two corporations. Since the estate's liabilities must be paid before any of testator's bequests can be satisfied, the court was correct in ordering a sale of the stock to pay the estate's liabilities.

[5] We are also asked to determine whether the court erred in ordering the sale of all the stock when sale of only a portion of it would be sufficient to pay the remaining liabilities of the estate. Included in the court's order were the following findings of fact:

> "2. At the time of decedent's death, all of the stock owned by decedent in Interstate Equipment Company and in Allstate Equipment Company was a single class of common stock, decedent owning fifty (50%) percent of the outstanding stock in each of said corporations.
>
> 3. Neither of the stocks described in the preceding paragraph has ever paid a dividend, nor it is (sic) likely that the payment of dividends is probable in the future with respect to either of said stocks.
>
> 4. The corporations described above have not elected to be treated as Subchapter S corporations under the Internal Revenue Code, nor is such election anticipated by the petitioner; indeed, no such election may be made by any corporation the stock of which is owned in whole or in part by a trust, which facts would prevail with respect to decedent's stock in Interstate Equipment Company and in Allstate Equipment Company if the said stock were delivered, in whole or in part, to Franklin H. Eller, Trustee.
>
> 5. The enforcement of Item IV of decedent's last will and testament resulting in the conveyance of the two above described stocks in trust for the minor children of decedent would not be to the best advantage or interest of any of the beneficiaries of the said trust, such stocks being presently non-income producing and there being no probability, in petitioner's opinion, that said stocks would become income producing through payment of dividends or otherwise.

6. In the event the Court should allow or order a sale of a portion of either or both of said stocks . . . for the payment of any of the costs of administration, debts or taxes of the estate of the decedent, such sale would result in there being available to the Trustee described in Item IV of decedent's last will and testament only a minority interest in either or both of said stocks upon conveyance of the remaining portion by the petitioner to the Trustee under Item IV of the decedent's last will and testament, such that the trust would thereafter be only a minority shareholder in either or both of said corporations.

These findings support the conclusion that it would be in the best interest of the beneficiaries to sell all the stock, applying the proceeds first to pay the remaining liabilities of the estate, with the remainder to be given to the Trustee.

The order appealed from is

Affirmed.

Judges PARKER and ARNOLD concur.

WILLA INA BRONDUM v. DONALD ALVIN COX

No. 7518DC939

(Filed 7 July 1976)

1. **Parent and Child § 10— Uniform Reciprocal Enforcement of Support Act — blood grouping test — jury trial**

A defendant is entitled in a proceeding under the Uniform Reciprocal Enforcement of Support Act to a blood grouping test pursuant to G.S. 8-50.1 where the issue of paternity is raised and, upon timely motion, is entitled to have the jury pass on the issue of paternity.

2. **Constitutional Law § 26— full faith and credit — void in personam judgment**

The courts of one state have no duty to give full faith and credit to the *in personam* judgment of a foreign state except where the foreign state obtained jurisdiction both as to the person and as to the subject matter of the action before it.

3. **Constitutional Law § 26; Divorce and Alimony § 23— foreign judgment determining paternity — no in personam jurisdiction — full faith and credit not given to foreign judgment**

Judgments for alimony and support of children are personal judgments; therefore, the N. C. court erred in giving full faith and

credit to the finding of a Hawaii court that defendant was the father of plaintiff's child and the judgment of that court requiring defendant to pay child support, since the Hawaii court never obtained personal jurisdiction over defendant.

Judge MORRIS dissents.

APPEAL by defendant from *Gentry, Judge.* Order entered 2 October 1975 in District Court, GUILFORD County. Heard in the Court of Appeals 11 March 1976.

This is a proceeding brought under the Uniform Reciprocal Enforcement of Support Act wherein the petitioner, Willa Ina Brondum, is seeking an order requiring the defendant, Donald Alvin Cox, to support the minor child, Noelani May Cox. In her complaint, filed in Honolulu, Hawaii, petitioner alleged that she was formerly married to the defendant and that the defendant is the father of her child, Noelani May Cox, born 11 September 1973. She alleged further that defendant refused to support the child and attached an affidavit which stated the child's financial needs and amount of petitioner's income. The defendant answered the complaint denying that he was the father of the child and moved for a blood grouping test pursuant to G.S. 1A-1, Rule 35 and 8-50.1 and for a jury trial on the issue of paternity.

At a hearing on defendant's motions on 25 September and 2 October 1975, petitioner introduced a divorce decree filed 21 August 1974 in the "Family Court" in Hawaii. The decree in pertinent part found that Noelani May Cox was "the minor child . . . of the parties" and awarded "the care custody and control of the minor child . . . of the parties" to the petitioner subject to reasonable rights of visitation by the defendant. The Hawaii court also ordered the defendant to pay to petitioner $100.00 per month "for the support, maintenance and education of the minor child."

The defendant testified at the hearing that he married the petitioner in Hawaii in 1967 while he was in the Air Force. After being discharged, he and the petitioner moved to Greensboro and lived there until February 1971 when petitioner's parents passed away. They, then, moved to Hawaii in order to settle the deceased parents' estates. While in Hawaii, they began having marital difficulties and the parties separated with the defendant returning to North Carolina in August 1973. The defendant knew petitioner was pregnant when they separated

but he denied that the child was his. Defendant admitted that subsequent to returning to North Carolina he was served with papers concerning the divorce action in Hawaii, but he testified further that he never filed any response nor ever appeared in the Hawaii divorce action either personally or through a representative. At the conclusion of the hearing, the court made the following pertinent findings:

> "2. The defendant has resided in North Carolina from August, 1973, until present (with the exception of approximately three weeks when he attended a school in New York in connection with his employment), and he has intended to reside in North Carolina indefinitely and to make his permanent home since August 1973.
>
> 3. The defendant has not been to Hawaii at any time since August, 1973.
>
> 4. Plaintiff instituted an action against defendant, numbered 'FC-D No. 85751' and entitled 'Willa Ina Cox v. Donald Alvin Cox' (hereinafter called the 'Hawaii divorce action') in the Circuit Court of the First Circuit, Family Court, State of Hawaii on October 2, 1973, the nature of said action being an action for divorce, attorney's fees, costs, property division, support for plaintiff and custody, support and education of one child, known as Noelani May Cox, alleged by the plaintiff to be the child of the parties.
>
> 5. Summons was issued to defendant in the Hawaii divorce action on October 2, 1973, and an order for service on the defendant by mail was entered by the Clerk of the Court in said action on the same day.
>
> 6. Defendant received by registered mail, return receipt requested, the summons and copy of the complaint at his residence in Pleasant Garden, Guilford County, North Carolina, sometime in October, 1973.
>
> 7. Defendant at no time appeared either generally or specially, in the Hawaii divorce action and at no time authorized an appearance by any person in said action on his behalf."

Judge Gentry concluded that:

> "1. The court in the Hawaii divorce action did not have *in personam* jurisdiction over defendant.

2. The court in the Hawaii divorce action did have *in rem* jurisdiction to enter a divorce decree entitled to full faith and credit in North Carolina.

3. The court in the Hawaii divorce action did have *in rem* jurisdiction to enter a custody order with respect to Noelani May Cox and said order is entitled to full faith and credit in North Carolina.

4. Because the court in the Hawaii divorce custody action had *in rem* jurisdiction as to those matters, and because the issue of paternity was inextricably bound up in the determination of these items, the finding of the Hawaii court as to the paternity of Noelani May Cox is conclusive as to the defendant, is entitled to full faith and credit in North Carolina, and may not be litigated by the defendant in North Carolina.

5. Because the defendant is bound by the findings of the Hawaii court in the Hawaii divorce action, and because the Uniform Reciprocal Enforcement of Support Act does not permit a trial by jury, a trial by jury on the issue of paternity is precluded."

He then denied defendant's motions for a blood grouping test and a jury trial. Defendant appealed.

Attorney General Edmisten by Assistant Attorney General Parks H. Icenhour for petitioner.

Jordan, Wright, Nichols, Caffrey and Hill by William W. Jordan for defendant appellant.

HEDRICK, Judge.

Defendant assigns as error the denial of his motions for a blood grouping test and for a jury trial.

[1] "A proceeding under the Uniform Reciprocal Enforcement of Support Act is a civil proceeding 'as in actions for alimony without divorce.' G.S. 52A-12." *Cline v. Cline*, 6 N.C. App. 523, 170 S.E. 2d 645 (1969). The procedure to be followed in an action for alimony without divorce "shall be as in other civil actions." G.S. 50-16.8(a); *Williams v. Williams*, 13 N.C. App. 468, 186 S.E. 2d 210 (1972); *see also Davis v. Davis*, 269 N.C. 120, 152 S.E. 2d 306 (1967). In "other civil actions" genuine issues of fact must be tried by a jury unless the right to a jury

trial is waived. *Sykes v. Belk,* 278 N.C. 106, 179 S.E. 2d 439 (1971); G.S. 1A-1, Rule 38; N. C. Const., Art. I, s. 25.

A defendant is entitled to a blood grouping test upon timely motion "in which the question of paternity arises" whether criminal or civil, regardless of any presumption which might arise when the child is born in wedlock. *Wright v. Wright,* 281 N.C. 159, 188 S.E. 2d 317 (1972); G.S. 8-50.1.

We hold a defendant is entitled in a proceeding under the Uniform Reciprocal Enforcement of Support Act to a blood grouping test pursuant to G.S. 8-50.1 where the issue of paternity is raised and, upon timely motion, is entitled to have the jury pass on the issue of paternity.

In the present case whether the court erred in denying the defendant's motion for a blood grouping test and a jury trial depends on whether the court erred in concluding:

> "[T]he finding of the Hawaii court as to the paternity of Noelani May Cox is conclusive as to the defendant, is entitled to full faith and credit in North Carolina, and may not be litigated by the defendant in North Carolina."

[2] The courts of one state have no duty to give full faith and credit to the *in personam* judgment of a foreign state except where the foreign state obtained jurisdiction both as to the person and as to the subject matter of the action before it. *Hosiery Mills v. Burlington Industries,* 285 N.C. 344, 204 S.E. 2d 834 (1974); *Fleek v. Fleek,* 270 N.C. 736, 155 S.E. 2d 290 (1967); *Arakaki v. Arakaki,* 54 Haw. 60, 502 P. 2d 380 (1972); *Peterson v. Peterson,* 24 Haw. 239 (1918); Wurfel, *Recognition of Foreign Judgments,* 50 N.C.L.R. 21 (1971). The order of the Hawaii court that the defendant pay $100.00 per month for the support of "the minor child of the parties" therefore must be given full faith and credit only if that judgment is not a personal judgment.

[3] Both Hawaii and North Carolina hold that judgments for alimony and support of children are personal judgments. *Peterson v. Peterson, supra; Fleek v. Fleek, supra; Surratt v. Surratt,* 263 N.C. 466, 139 S.E. 2d 720 (1965); *Lennon v. Lennon,* 252 N.C. 659, 114 S.E. 2d 571 (1960); Lee, 1 N. C. Family Law, § 99. The district court correctly concluded that the courts of Hawaii in the present case did not have personal jurisdiction over the defendant. Thus, that portion of the judgment of the

court in Hawaii requiring the defendant to pay $100.00 per month for the support of "the minor child of the parties" is void, simply because the Hawaii court never obtained personal jurisdiction of the defendant; and such a judgment cannot be used as a basis of a claim or defense in this State. *Hosiery Mills v. Burlington Industries, supra.*

Obviously, the order of the court of Hawaii requiring the defendant to support Noelani May Cox was based on the material finding and conclusion that the defendant was her father. If the order of a foreign state requiring a father to support his child is a "personal judgment," we think that the material finding upon which such order is based is likewise "personal," and need not be given full faith and credit unless the court making such finding had personal jurisdiction of the defendant. *See generally Hartford v. Superior Court,* 47 C. 2d 447, 304 P. 2d 1 (1956); *Watkins v. Watkins,* 254 S.W. 2d 735 (Tenn. 1953).

We hold the trial court erred in concluding:

> "[T]he finding of the Hawaii court as to the paternity of Noelani May Cox is conclusive as to the defendant, is entitled to full faith and credit in North Carolina, and may not be litigated by the defendant in North Carolina."

The court likewise erred in denying defendant's timely motion for a blood grouping test and a jury trial to determine the issue of paternity.

Reversed.

Judge ARNOLD concurs.

Judge MORRIS dissents.

Privette v. Privette

MILDRED RUTH PRIVETTE, INDIVIDUALLY, AND MILDRED RUTH PRIVETTE, GUARDIAN AD LITEM OF MARTHA LYNETTE KEMPER, MINOR, PETITIONERS v. ERNESTINE W. PRIVETTE, WIDOW; AVON PRIVETTE, JR., AND WIFE, DEBBIE D. PRIVETTE; EUGENE PRIVETTE AND WIFE, CARMEN PRIVETTE; PEOPLES BANK & TRUST COMPANY OF ROCKY MOUNT, NORTH CAROLINA, EXECUTOR OF THE LAST WILL AND TESTAMENT OF AVON PRIVETTE, SR.; CENTRAL CAROLINA BANK AND TRUST COMPANY, DURHAM, NORTH CAROLINA, EXECUTOR OF THE LAST WILL AND TESTAMENT OF WADE H. PRIVETTE, DEFENDANTS v. PEOPLES BANK & TRUST COMPANY, TRUSTEE FOR WILLIAM AVON PRIVETTE, JR., UNDER THE WILL OF AVON PRIVETTE, THIRD-PARTY DEFENDANT

No. 769SC139

(Filed 7 July 1976)

Rules of Civil Procedure §§ 6, 55— motion for extension of time to plead — motion to set aside entries of default

In an action for partition of land, the trial court did not abuse its discretion in (1) the denial of respondent appellant's Rule 6(b) motion for an extension of time to plead to crossclaims alleging that appellant has no interest in the property in question and (2) the denial of appellant's Rule 55(d) motion to set aside entries of default against him as to the crossclaims where appellant's affidavit stated that an attorney advised him that it was not necessary to file an answer to the petition for partition and that he did not consult an attorney about the crossclaims and was unaware that he had to file a responsive pleading to protect his interest in the property, and where affidavits of the other respondents purported to show that appellant had conveyed away his interest in the property in question.

APPEAL by respondents Eugene Privette and wife Carmen Privette from order of *Bailey, Judge,* entered 27 February 1975 and judgment of *Godwin, Judge,* entered 18 September 1975 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 25 May 1976.

This cause began as a special proceeding to partition real estate. In the petition, filed 30 August 1974, petitioner alleges in pertinent part:

Petitioner Mildred Ruth Privette (Mildred) is the widow, and her ward, Martha L. Kemper (Martha) is the daughter of the late Wade H. Privette (Wade). Respondent Ernestine W. Privette (Ernestine) is the widow and respondent Avon Privette, Jr., (Avon, Jr.) is the son of the late Avon Privette, Sr.

(Avon). Respondent Peoples Bank & Trust Company of Rocky Mount (Peoples Bank) is executor of the last will and testament of Avon and respondent Central Carolina Bank and Trust Company (C.C.B.) is executor of the last will and testament of Wade.

Petitioners and respondents Ernestine and Avon, Jr., are tenants in common in two tracts of land located in Wake County and five tracts of land located in Franklin County, petitioners owning one-half interest in said lands and said respondents owning the other half. Petitioners and said respondents, together with respondent Eugene Privette (Eugene), are tenants in common of a 40⅝-acre tract in Franklin County, petitioners owning a one-third interest, respondents Ernestine and Avon, Jr., a one-third interest, and respondent Eugene a one-third interest.

Petitioners asked that certain timber on the lands be sold and the proceeds therefrom distributed to the tenants in common according to their respective interests; that the land then be partitioned among the owners according to their respective interests.

Process was served on all respondents in apt time. Eugene filed no answer but the other respondents filed answer denying that Eugene owned any interest in the 40⅝-acre tract. In further answers and crossclaims against Eugene and others, respondents Peoples Bank and C.C.B. alleged, *inter alia,* the following:

At some time prior to 1946 brothers Wade, Avon and Eugene each inherited a one-third undivided interest in certain realty from their father, including the 40⅝-acre tract of land in question. In January 1946 Eugene conveyed his one-third interest to Wade and Avon. (It is disputed whether the descriptions set forth in the deed included the subject tract.) Avon died in 1970 and Peoples Bank is holding his interest in the subject tract and the other lands as trustee. Wade died in 1974 and C.C.B. is holding his interest in the lands as executor and trustee. The deed from Eugene to Avon and Wade included the tract in question, and, in any event, Peoples Bank and C.C.B., and those under whom they claim, have been in adverse possession of said land for more than twenty years. Eugene nor his wife has any interest in the land and petitioners and Avon's widow and son have no standing to demand a partition of the land.

The crossclaims were served on Eugene and wife, one by mail and the other by the sheriff, on 28 October 1974. They filed no answer and on 13 February 1975 respondents, except Eugene and wife, filed motion for summary judgment. The motion was supported by affidavits, including one from petitioner adopting the position taken by the movants.

Eugene responded to the motion by affidavit explaining his failure to file answer to the crossclaims and asserting that he claimed one-third interest in the subject tract. On 24 February 1975 he moved for an extension of time within which to answer Peoples Bank's crossclaim; he did not mention C.C.B.'s crossclaim. On 24 February 1975 Judge Bailey entered orders denying the motion for summary judgment and denying Eugene's motion for extension of time to plead.

On 27 February 1975 the clerk entered default against Eugene as to both crossclaims. On 18 March 1975 Eugene, treating the affidavit which petitioner had filed in connection with the motion for summary judgment as an "amended petition," filed answer asserting his claim to a one-third interest. Eugene then moved for summary judgment and to set aside the entries of default. Respondents, except Eugene and wife, moved to strike Eugene's answer and renewed their motion for summary judgment. On 18 September 1975 Judge Godwin entered an order denying Eugene's motion to set aside the entries of default, and, upon Eugene's waiver of further notice, entered default judgment on the crossclaims. Eugene and wife appealed from the order of Judge Bailey denying his request for extension of time within which to plead and from the default judgment entered by Judge Godwin.

Yarborough, Jolly & Williamson, by E. F. Yarborough and Wilbur M. Jolly, for petitioner appellees.

Davis & Davis, by F. Leary Davis, for respondent appellees and third-party respondent appellees.

J. Michael Weeks for respondent appellants.

BRITT, Judge.

Appellants contend the trial court erred in (1) denying their motion pursuant to G.S. 1A-1, Rule 6(b), for an extension of time to plead to the crossclaims, (2) denying their motion pursuant to Rule 55(d) to set aside the entry of default

against them, and (3) entering default judgment on the crossclaims. We find no merit in the contentions.

It is clear that a motion pursuant to Rule 6(b) to enlarge the time for filing a pleading, and a motion pursuant to Rule 55(d) to set aside an entry by default are addressed to the discretion of the trial court. *Insurance Company v. Chantos,* 21 N.C. App. 129, 203 S.E. 2d 421 (1974). In addition, where a Rule 6(b) motion is made after the specified period, the rule expressly provides that the judge *may* allow the motion " . . . where the failure to act was the result of excusable neglect"; and the Rule 55(d) motion *may* be allowed "[f]or good cause shown . . . . " It is also clear that a discretionary order of the trial court is conclusive on appeal absent a showing of abuse of discretion. 1 Strong, N. C. Index 3d, Appeal and Error § 54.

In his affidavit filed with his Rule 6(b) motion, Eugene stated: He was personally served with process in the proceeding on 9 September 1974 and immediately sought the advice of legal counsel. His attorney advised him that if the allegations of the petition were true, it would not be necessary for him to file a responsive pleading. Relying on that advice, he filed no pleading. When the crossclaims were served on him on 29 October 1974, he did not consult his attorney and was unaware that he had to file a responsive pleading in order to protect his interest in the subject property. After receiving a copy of the notice and motion for summary judgment in February 1975, he consulted his attorney. If allowed to plead, he would deny the allegations of the crossclaims that he owns no interest in the subject property and that the other parties, and those under whom they claim, had been in adverse possession of the property for more than twenty years.

In the affidavits filed by respondents, except Eugene and wife, said respondents purported to show, among other things, that the deed from Eugene to Avon and Wade actually included the subject property. In his affidavit, T. H. LeCroy stated that he was formerly a vice-president of Peoples Bank; that in October 1971 Eugene told him that when he executed the deed to Avon and Wade he thought he was conveying all his interest in all Franklin County farms formerly owned by his father.

We hold that Judge Bailey did not abuse his discretion in denying Eugene's Rule 6(b) motion, and that Judge Godwin

did not abuse his discretion in denying the Rule 55(d) motion. In view of this holding, we further hold that Judge Godwin did not err in entering judgment by default final against Eugene and wife. G.S. 1A-1, Rule 55(b)(2).

Pursuant to Rule 10(d) of the Rules of Appellate Procedure, appellees cross assign as error the failure of the trial court to rule on their motion for summary judgment filed 21 May 1975 on the grounds that on the record before the court there was no genuine issue as to any material fact and the movants were entitled to judgment in their favor as a matter of law, and said omission by the court deprived them of an alternative basis in law supporting the judgment from which appeal has been taken.

Inasmuch as we are affirming the judgment entered by Judge Godwin, which judgment includes the same relief appellees would receive through summary judgment, no ruling upon the cross assignment is necessary.

The order and judgment appealed from are

Affirmed.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. DON LEGENE BASINGER

No. 7619SC132

(Filed 7 July 1976)

1. **Automobiles § 127— drunken driving — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for driving on a public highway while under the influence of intoxicating liquor where the arresting officer testified as to defendant's conduct, appearance and performance of tests and gave his opinion that defendant was under the influence of alcohol, and a breathalyzer operator testified that defendant's blood alcohol content was .14.

2. **Automobiles § 126— breathalyzer results — delay between arrest and test**

A delay of 50 minutes between defendant's arrest and the administration of a breathalyzer test to him did not render the results of the test inadmissible in evidence.

3. Automobiles § 120— driving when alcohol content is .10 percent — constitutionality of statute

The statute prohibiting driving upon the public highways when the alcohol in one's blood is .10 percent or more by weight, G.S. 20-138(b), is a constitutional exercise of the police power by the General Assembly.

4. Automobiles § 120— driving when alcohol content is .10 percent — lesser offense of driving under influence — validity of statute

Provision of G.S. 20-138(b) that an offense of driving upon a public highway when one's blood alcohol content is .10 percent or more shall be treated as a lesser included offense of driving under the influence prohibited by G.S. 20-138(a) is valid.

APPEAL by defendant from *Kivett, Judge.* Judgment entered 16 September 1975 in Superior Court, ROWAN County. Heard in the Court of Appeals 11 May 1976.

Defendant was charged in a warrant with the misdemeanor of operating a motor vehicle on the public highways while under the influence of intoxicating liquor on 3 March 1975. The offense alleged in the warrant is an offense under subsection (a) of G.S. 20-138. He was tried and found guilty in district court. Upon defendant's appeal to superior court, he was tried *de novo* upon the original warrant. He was found guilty by a jury of the offense proscribed by subsection (b) of G.S. 20-138, and judgment was entered upon the verdict. He appeals to this Court upon questions of law.

Attorney General Edmisten, by Associate Attorney James E. Scarbrough, for the State.

Carlton, Rhodes & Thurston, by Gary C. Rhodes, for the defendant.

BROCK, Chief Judge.

[1] The State offered the testimony of the arresting officer concerning defendant's conduct, appearance, and performance of tests. The arresting officer also testified that based upon his observations he was of the opinion that defendant was under the influence of alcohol. The State offered the testimony of the officer who administered the breathalyzer to defendant to the effect that the defendant's blood alcohol content was 0.14. This evidence was sufficient to overcome defendant's motions to dismiss. Defendant's assignment of error No. 3 is overruled.

[2] Defendant argues that because of the lapse of time between the arrest and the performance of the breathalyzer test, the results of the test should not have been allowed in evidence. The State's evidence tends to show that defendant was arrested at 10:35 p.m. and that the test was administered at 11:25 p.m. The lapse of time was fifty minutes. We have already held that a delay of over two hours between the arrest and the test does not alone render the results of the test inadmissible. *State v. Oldham,* 10 N.C. App. 172, 177 S.E. 2d 769 (1970). Defendant's assignment of error No. 2 is overruled.

Defendant's assignment of error No. 1 constitutes a dual attack upon G.S. 20-138(b). Since subsections (a) and (b) are involved in the discussion that follows, the pertinent parts of both subsections are quoted below:

> "(a) It is unlawful . . . for any person who is under the influence of intoxicating liquor to drive or operate any vehicle upon any highway or any public vehicular area within this State.
>
> "(b) It is unlawful for any person to operate any vehicle upon any highway or any public vehicular area within this State when the amount of alcohol in such person's blood is 0.10 percent or more by weight. . . . An offense under this subsection shall be treated as a lesser included offense of the offense of driving under the influence."

The 1973 amendment to G.S. 20-138, effective 1 January 1975, added subsection (b).

[3] First, defendant argues that the new offense of driving when the alcohol in one's blood is 0.10 percent or more by weight is an arbitrary and unconstitutional exercise of the police power of the State because there is no evidence that a driver with 0.10 percent or more of alcohol in his blood is a threat to the health, safety, or welfare of the citizens. We will not discuss the numerous scientific studies which have shown the state of intoxication of persons with various degrees of alcohol in their blood. *See,* for example, Little, *Control of the Drinking Driver: Science Challenges Legal Creativity,* 54 A.B.A.J. 555 (June, 1968). Suffice to say, from 1963 to 1975 there was a statutory presumption in this State that a person with 0.10 percent or more by weight of alcohol in his blood was under the influence

of intoxicating liquor. G.S. 20-139.1(a) (repealed by the 1973 amendment effective 1 January 1975). Our Supreme Court has held that the results of a breathalyzer test are admissible in evidence, and a test showing 0.10 percent or more by weight of alcohol in a defendant's blood is sufficient to carry the State's case to the jury on the question of whether defendant was under the influence of intoxicating liquor. *State v. Cooke,* 270 N.C. 644, 155 S.E. 2d 165 (1967). We hold that the prohibition against driving upon the public highways when the amount of alcohol in one's blood is 0.10 percent or more by weight contributes in a real and substantial way to the safety of other travelers. The challenged statute is a constitutional exercise of police power by the General Assembly.

[4] Second, defendant argues that the last sentence of subsection (b) of the challenged statute ("An offense under this subsection shall be treated as a lesser included offense of the offense of driving under the influence.") is invalid because it purports to make a lesser included offense of an offense which does not necessarily have the same elements as the greater offense. For a discussion of what constitutes a lesser included offense, *see State v. Richardson,* 279 N.C. 621, 185 S.E. 2d 102 (1971); 42 C.J.S., Indictments and Informations, § 286, p. 1308.

The elements of the offense defined in G.S. 20-138(a) are (1) driving a vehicle, (2) upon a highway (or public vehicular area) within the State, (3) while under the influence of intoxicating liquor. *State v. Kellum,* 273 N.C. 348, 160 S.E. 2d 76 (1968). The elements of the offense defined in G.S. 20-138(b) are (1) driving a vehicle, (2) upon a highway (or public vehicular area) within the State, (3) when the amount of alcohol in the driver's blood is 0.10 percent or more by weight.

The first two elements of the offense defined in each subsection are the same. Although evidence to establish the third element under subsection (b) is not required in order to convict under subsection (a), such evidence is clearly competent to establish the third element of subsection (a). G.S. 20-139.1(a). Also there is clearly a rational relationship between the third elements of each of the subsections.

Contrary to defendant's argument, the Legislature did not undertake to mandate that the offense defined in subsection (b) *shall be* a lesser included offense of the offense defined in subsection (a). Subsection (b) of the statute in question says:

"An offense under this subsection *shall be treated as* a lesser included offense. . . . " (Emphasis added.) The clear intent of the Legislature in choosing this language is threefold:

(1) In order that a defendant shall not be twice convicted by prosecution under each subsection separately, an offense under subsection (b) is to be treated as a lesser included offense of an offense under subsection (a) for protection against such double jeopardy;

(2) To place a defendant on notice by statute that in a prosecution under subsection (a), if there is evidence of a chemical analysis of his breath or blood indicating that the amount of alcohol in his blood is 0.10 percent or more by weight, he may be convicted under subsection (b); and

(3) To provide that where there is evidence of a chemical analysis of a defendant's breath or blood offered in a prosecution under subsection (a), the offense under subsection (b) shall be submitted as a lesser included offense.

Obviously, in a prosecution under subsection (a), where there is no evidence offered of a chemcal analysis of the defendant's breath or blood indicating that the amount of alcohol in defendant's blood was 0.10 percent or more by weight, the offense under subsection (b) may not be submitted as a lesser included offense.

Defendant's further argument that the offense under subsection (b) cannot be treated as a lesser included offense of that under subsection (a) because the punishment prescribed for each is the same does not persuade us. We think this statutory arrangement is a logical and permissible effort by the Legislature to provide for safety on the highways of this State.

No error.

Judges BRITT and CLARK concur.

DAVID LEO WILLIAMSON AND CLETIS MOORE v. ANGELA B. BASINGER AND CHARLOTTE HOLLARS KRIMMINGER

No. 7619SC63

(Filed 7 July 1976)

1. **Automobiles § 88— contributory negligence — sufficiency of evidence**

In an action for personal injury and property damage, evidence that plaintiff ran into defendant's vehicle which was parked on the traveled portion of the highway without any lights on, and that plaintiff failed to see the parked car prior to the actual collision created a reasonable inference that plaintiff was contributorily negligent in operating his vehicle without keeping a reasonable lookout, in failing to keep his vehicle under proper control, in traveling at a speed greater than reasonable and prudent under the circumstances, or in failing to reduce speed to avoid colliding with defendant's car.

2. **Automobiles §§ 86, 91— last clear chance of plaintiff — no damages awarded to defendant — any inconsistency not prejudicial**

In an action for personal injury and property damage sustained in an automobile collision, any inconsistency in the verdict finding that plaintiff had the last clear chance to avoid the accident but refusing to award damages to either party was beneficial to plaintiff.

3. **Automobiles § 89— last clear chance — sufficiency of evidence**

In an action for personal injury and property damage sustained in an automobile collision, even if the evidence was insufficient to invoke the doctrine of last clear chance, plaintiffs were not prejudiced by the submission of such an issue to the jury, since defendants were not awarded damages against plaintiff.

APPEAL by plaintiffs from *Kivett, Judge.* Judgment entered 27 August 1975 in Superior Court, ROWAN County. Heard in the Court of Appeals 7 May 1976.

On the evening of 9 July 1973, plaintiff Williamson was employed as a taxicab driver and operated a cab owned by plaintiff Moore. While carrying a fare passenger from North Kannapolis to China Grove, North Carolina, at approximately 11:45 p.m. of the same day, the cab driven by Williamson crashed into the rear of a car parked in the left northbound lane of Highway 29, some 350 feet beyond the intersection of U. S. 29 and Ebenezer Road in North Kannapolis. The parked car belonged to Charlotte Hollars Krimminger. Shortly before the accident Krimminger had loaned the car to her niece, Angela B. Basinger. Basinger testified that after she turned north onto U. S. 29 at the Ebenezer Road intersection, the car stalled. She attempted to start the car to no avail. Unable to move the

car off the highway by herself, she decided to return by foot to the place where her aunt (Krimminger) was working to obtain assistance. According to the narrative summary of Basinger's testimony, "[s]he stated that she was going to cut the lights back on but the car would not start and she didn't think the lights would come on, and if she left the lights on the battery would go dead and she would never get it out of the road; she stated she left the lights off; . . . "

Plaintiffs filed a complaint alleging that Basinger was negligent in that: (a) "she parked and left standing the 1963 Ford vehicle unattended upon the paved or improved or main travel portion of Highway 29, Cannon Boulevard, without leaving a clear and unobstructed width of 15 feet upon the main travel portion of the lane in which she was traveling for free passage of other vehicles and without leaving a clear view of such from a distance of 200 feet in both directions in violation of G.S. 20-161(a)"; and (b) "she failed to display upon the vehicle which she operated a red light visible from a distance of 500 feet to the rear in volation of the form and proscription contained in G.S. 20-134 of the North Carolina General Statutes"; and as a result of her negligence, plaintiff Williamson suffered serious personal injuries and plaintiff Moore's cab was damaged beyond repair. Defendants denied negligence on their part and further alleged that Williamson's injuries and the damage to Moore's cab were caused by Williamson's negligence in failing to maintain a proper lookout, operate the cab at a reasonable and safe speed under the circumstances, decrease speed in order to avoid the collision, or exercise the last clear chance to avoid the collision. In addition defendants asserted a counterclaim against plaintiffs to recover for the damage done to defendant Krimminger's car.

At the close of plaintiffs' evidence, defendants moved for a directed verdict on the theory that the evidence revealed that Williamson, the driver of the cab, was contributorily negligent as a matter of law. This motion was denied. At the close of all the evidence, plaintiffs moved for a directed verdict with respect to defendants' counterclaim on the grounds that defendant Basinger was contributorily negligent as a matter of law for leaving the stalled car in the highway without turning on the rear lights. Also plaintiffs moved that the evidence was insufficient to justify submission of the issue of their contributory negligence to the jury. Both of plaintiffs' motions were denied.

The jury returned the following verdict:

"1. Were the plaintiffs Williamson and Moore injured and damaged by the negligence of the defendants Basinger and Krimminger?

ANSWER: Yes.

"2. Did the plaintiff Williamson, individually and as employee and agent of the plaintiff Moore, contribute to the plaintiff's own injury and damage?

ANSWER: Yes.

"3. What amount, if any, is the plaintiff Williamson entitled to recover of the defendants Basinger and Krimminger for personal injuries?

ANSWER: 0.

"4. What amount, if any, is the plaintiff Moore entitled to recover for damage to his 1966 Ford automobile?

ANSWER: 0.

"5. Did the plaintiff David Williamson have the last clear chance to avoid the collision?

ANSWER: Yes.

"6. What amount, if any, is the defendant Krimminger entitled to recover of the plaintiffs for damage to her 1963 Ford automobile?

ANSWER: 0."

Plaintiffs appealed.

Carlton, Rhodes & Thurston, by Gary C. Rhodes, for the plaintiffs.

Kluttz and Hamlin, by Richard R. Reamer, for the defendants.

BROCK, Chief Judge.

[1] Initially plaintiffs argue that it was improper to submit the issue of Williamson's contributory negligence to the jury. The judge instructed the jury that plaintiff Williamson would be contributorily negligent if they found from the evidence that

he had (1) operated the cab without keeping a reasonable lookout, (2) failed to keep the cab under proper control, (3) traveled at a speed greater than reasonable and prudent under the circumstances, or (4) failed to reduce speed to avoid colliding with defendant Krimminger's car. According to the narrative summary of plaintiff Williamson's testimony at trial,

> "he [Williamson] observed a car turning right at the Ebenezer Road intersection at the stoplight; that the traffic light was on green and he, David Leo Williamson, was driving north; that he does not recall seeing any other vehicle and that when he hit the car he thought the car had come from the southbound lane across the median and hit him head-on. He didn't see any lights and didn't see the other car. He was in the northbound passing lane of Highway 29 because there was a car in the right-hand lane turning to the right. He then proceeded under the light at the Ebenezer Road intersection and did not see any vehicle in either lane in the road ahead. There were no lights in the vicinity and he saw no lights from any other vehicle. The lights from his vehicle were on at the time, but he did not recall whether they were on bright or dim, and did not recall whether he had dimmed them or not; he observed no other traffic at all ahead of him as he proceeded through the Ebenezer Road intersection and when he hit the other car he thought that another car might have come across the median and hit him. He did not see the other car at all before he hit it; that when the collision occurred, it stopped his car dead-still and knocked the other car up a little ways; . . . "

Williamson's failure to see the parked car prior to the actual collision under the circumstances of this case creates a reasonable inference that he was contributorily negligent in one or more of the several modes described in the judge's instruction. This assignment of error is overruled.

[2] Plaintiffs contend that the trial judge erred in not setting aside the verdict for patent inherent inconsistency. Plaintiffs argue that since the jury found both plaintiff Williamson and defendant Basinger negligent, and further found plaintiff Williamson to have had the last clear chance to avoid the accident, but refused to award damages to either party, the verdict is inconsistent and ought to be set aside. The jury found that

plaintiff had the last clear change to avoid the accident; if the jury had been satisfied by the greater weight of the evidence that Krimminger's car was damaged, the defendant would be entitled to an award of damages. Yet it was the plaintiffs, not defendant, who moved to set aside the verdict. There is no suggestion that the judge abused his discretion by denying plaintiffs' motion. Moreover, rather than produce prejudicial error, the inconsistency of which plaintiffs complain was beneficial to them. This assignment of error is overruled.

[3] Finally plaintiffs argue that the evidence was insufficient to invoke the doctrine of last clear chance. Even if this contention were correct, plaintiffs were not prejudiced by the submission of the issue of last clear chance to the jury. Although the jury found that plaintiff Williamson had failed to exercise the "last clear chance" to avoid the collision with defendant's car, defendants were not awarded damages against plaintiff. This assignment of error is overruled.

In view of the finding by the jury that plaintiff was negligent, and our conclusion of no error upon the negligence issues, plaintiffs' assignments of error concerning medical testimony are rendered academic and require no discussion.

In our opinion plaintiffs received a fair trial free from prejudicial error.

No error.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. ROBERT EARL COX

No. 7615SC191

(Filed 7 July 1976)

Criminal Law § 73— statement by defendant or another — hearsay

In a prosecution for breaking and entering and larceny, testimony by a State's witness that either defendant or his companion told her they had left "the stuff" in the woods was incompetent as hearsay; however, the admission of such testimony was harmless error beyond a reasonable doubt where there was plenary competent evidence of defendant's complicity in the breaking and entering and the jury found defendant not guilty of larceny.

State v. Cox

APPEAL by defendant from *Canaday, Judge.* Judgment entered 10 December 1975 in Superior Court, ORANGE County. Heard in the Court of Appeals 8 June 1976.

Defendant was indicted for felonious breaking and entering and larceny. From a plea of not guilty, the jury returned a verdict of guilty of felonious breaking and entering. From judgment sentencing him to a term of imprisonment, defendant appealed.

At trial, the State's evidence tended to show that on or about 24 April 1975, the defendant, accompanied by Sammy Couch, Bobby Rory and Paula Jestes, broke into, entered and carried away from a dwelling house certain articles of personal property.

Paula Jestes, testifying for the State, recalled the events surrounding the commission of the alleged crime and noted that on the morning in question she first drove to a Durham motel where she saw the defendant, Bobby Rory and Sammy Couch. She testified that after they left the motel, the group

> " . . . went to a 7-11 there and they bought some gloves. Bobby Rory and Robert Cox went inside the 7-11. Yes, I saw the gloves that were bought. They looked like work gloves. I'd say about eight, eight-thirty is when they bought the gloves, somewhere between there. After the gloves were bought we started riding around.
>
> Bobby Rory was driving the automobile at that time. I believe that I was in the back seat. Mr. Cox was in the front seat with Bobby. Well, we started riding around, anyway. . . . It was in Orange County. I really can't describe it because I'd never been there before. It was out in the country. We turned off on a dirt road. It dead-ends. I think that after we turned off on a dirt road that we saw only one house. It was about a mile, something like that down the road. I'd say something about like a mile.
>
> As the car was turned on the dirt road, well, we went on down the road and, anyway, we met this man and woman in a car and they were leaving, so as we went on down the road, we came to the house on the right, and we pulled up in the driveway, and Bobby Rory and Robbie Cox got out. Uh, the driveway was something like a circle. Bobby Rory and Robert Cox got out of the car.

They went and knocked on the door and no one was there, so they came back to the car and then they got Sammy Couch out and they took the gloves with them. I really don't know who took the gloves. Yes, I said Cox, Couch and Rory, it was one of those three. Bobby Rory and Robert Cox, they were in front of Sammy Couch.

Well, they told me to go back up the road and sit until they came out and waved for me to come down there and pick them up, so I did, and I sit there until the car came up behind me and then I left. I went down to the dead-end of the road, I turned around down there and I picked up Robbie Cox and Bobby Rory.

Mr. Cox and Mr. Rory came from the woods. From the woods. Robert Cox got in the back and Bobby got in the front under the steering wheel, and I slid over to the front of the seat and got down. Bobby Rory got into the driver's seat. Mr. Cox laid down in the back seat. Bobby and Robbie were in the car at that time. Bobby Rory and Robbie Cox.

Mr. Couch went up the road, anyway, as we left we picked him up. I'd say something about half a mile, something like that up the road before we picked up Mr. Couch. He was walking back towards the road. The road that we turned off of. He brought back a watch. A watch. It was a pocket watch. Bobby had it, I think. Well, I know it was gold, and had a chain on it. Had a chain on it.

About the watch: Mr. Cox said just that they left the stuff in the woods. They left the stuff in the woods. Either Mr. Cox or Bobby Rory, either one. Yes, he told me what the stuff was. They said it was—well, I can't remember whether it was Cox or Rory, but one of them did tell. Well, it was one of them.

ATTORNEY VICKERY: Object, move to strike.

COURT: Overruled, motion denied. Goes to the weight of the evidence, not the admissibility; the weight abates in your favor in this instance.

A. One of them said it was some gold or some silver, some silverware, and then they had the watch, and that was about all.

DEFENDANT'S EXCEPTION NO. 6

> After Mr. Couch was picked up from the road, we left and went back into Durham County. Where did they get it from? Mr. Sykes' house. Right, we went back to Durham. We went—we kept on riding around. I believe that was the same day that a house in Durham was broken into. All I know, they said it was in a bedspread, stuff like that. They tied it up.
>
> I think that Bobby Rory was the one that said it. No, none of them didn't tell me how they got into the house. No one told me about how they got in there. Then we went riding around and we went out on Sharon Road."

Mr. and Mrs. G. P. Sykes, owners of the home, testified for the State. Mr. Sykes recalled that upon returning home he and his wife saw a red Mustang being driven by Paula Jestes, whom they were able to identify; that as they approached, she accelerated, but they were able to get the license number; that they saw two men run into the woods, come back out, and run toward the red Mustang; that Paula Jestes "backed up" and picked up the man; that when they came back by the house there were two men on the back seat with their heads down; that they went in the house and discovered it had been entered. Mr. Sykes called the Sheriff's Department and reported the break-in and robbery and told the officers what items were missing. He later found all the items, except a pocket watch, tied up in a bedspread.

Robert Kester, an officer with the County Sheriff, testified that "everything was there [in the sheet] except a pocket watch . . . " and pointed out that the items were brought back to the Sykes' house. Officer Kester, moreover, recalled that during the course of his investigation that evening he noticed that

> " . . . an Oldsmobile came down the road and turned around and came back up, and I stopped the vehicle and Sammy Couch and Robert Rory were in the vehicle. I checked the driver's license, found out who they were and asked them to come up to Mr. Sykes' house, that he had had a break-in that day, which they did, and I believe it was Mr. Sykes said that he thought he knew Sammy Couch, identified him as being the one that was up there earlier that day.

No, sir, I did not see Mr. Cox there at that particular time, he was not in the vehicle. The next morning I talked with Paula Jestes. Yes, sir, I talked with her. That was on April 25, 1975. I talked with her in Durham at the Cricket Inn.

Well, upon questioning Robert Rory and Sammy Couch, one of them had stated they were—I went to the Cricket Inn and spotted a Mustang, license number HMH266. HMH266, it was a red Mustang. In the room that I went to was Robert Cox, Sammy Couch and Paula Jestes. . . . "

Finally, on cross-examination, Officer Kester stated that " . . . two people came to get the merchandise from the woods. Sammy Couch and Robert Rory came to get it. . . . "

Miss Jestes allowed a search of her car and Officer Kester stated that he found work gloves in the car.

The defendant presented no evidence, but moved for judgment as of nonsuit. The motion was denied and the case was duly sent to the jury.

Other facts necessary for decision are set out below.

Attorney General Edmisten, by Associate Attorney James Wallace, Jr., for the State.

Winston, Coleman and Bernholz, by Charles E. Vickery, for defendant appellant.

MORRIS, Judge.

Defendant contends that the court committed reversible error when he overruled defendant's motion to strike the testimony of Paula Jestes with reference to the watch and what "the stuff was" they left in the woods. She testified she could not remember "whether it was Cox or Rory, but one of them did tell." Defendant argues that the statement could not, with a sufficient degree of certainty, be attributed to the defendant and should have been stricken as hearsay. Defendant's premise is correct. However, we fail to see how this error sufficiently prejudiced defendant to require a new trial. Evidence of defendant's complicity in the breaking and entering was plenary. Defendant was found not guilty of larceny. The evidence to which he so strenuously objects merely went to identification of items taken or left in the woods. The witness had already testified

fully with respect to the breaking and entering. The "stuff" found in the woods was identified by the prosecuting witnesses. Paula Jestes had already testified, without objection, that "[he] brought back a watch. A watch. It was a pocket watch. Bobby had it, I think. Well, I know it was gold, and had a chain on it." It is inconceivable that the testimony of which defendant complains might have contributed to his conviction. Otherwise, it is harmless error beyond a reasonable doubt. *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972); *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967); rehearing denied 386 U.S. 987.

We find defendant's other assignments of error also to be without merit.

No error.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. ROBERT CARTER

No. 7525SC1022

(Filed 7 July 1976)

1. **Constitutional Law §§ 20, 30; Criminal Law § 22— arraignment — reading indictment before jury — no denial of equal protection or due process**

The purpose of an arraignment is to advise defendant of the crime with which he is charged, and the solicitor must read the charges or fairly summarize them to defendant. The fact that this is done before the jury is not a violation of defendant's right to due process and equal protection as required by the N. C. and U. S. Constitutions. G.S. 15A-941.

2. **Criminal Law § 114; Homicide § 23— reading of indictment to jury by trial court — no prejudice**

Prejudicial error did not result from the trial court's reading the indictment to the jury and advising the jury that the State had elected not to place defendant on trial for murder in the first degree but would place him on trial for murder in the second degree or for such other offense as the evidence might warrant.

3. **Homicide § 24— presumptions of malice and unlawfulness — self-defense — burden of proof — instructions proper**

In a prosecution for second degree murder, the trial court's instructions concerning the legal presumptions of an unlawful and

malicious killing and concerning self-defense were proper; moreover, the court properly placed the burden of proof upon the State with respect to the elements of manslaughter, self-defense, and heat of passion upon adequate provocation.

APPEAL by defendant from *Ervin, Judge.* Judgment entered 7 August 1975 in Superior Court, BURKE County. Heard in the Court of Appeals 6 April 1976.

Defendant, indicted for murder, was tried for and convicted of murder in the second degree. From judgment sentencing him to a term of imprisonment, defendant appealed.

Other facts necessary for decision are set out in the opinion.

Attorney General Edmisten, by Associate Attorneys Jo Anne Routh and Daniel C. Oakley, for the State.

Mitchell, Teele & Blackwell, by H. Dockery Teele, Jr., for defendant appellant.

MORRIS, Judge.

[1, 2] Defendant first argues that reversible error was committed when the defendant was arraigned immediately before trial and the bill of indictment read before the jury and that this error was compounded when the court later read the indictment to the jury at the beginning of his charge. Defendant calls attention to G.S. 15A-943 [effective 1 July 1975 and its procedures required only in counties in which there are regularly scheduled 20 or more weeks of criminal sessions of court], which provides that "the solicitor must calendar arraignments in the superior court on at least the first day of every other week in which criminal cases are heard. No cases in which the presence of a jury is required may be calendared for the day or portion of a day during which arraignments are calendared." Defendant argues that one of the purposes of this statute is to prevent the possibility of prejudicing the defendant's case by reading the indictment in the presence of the jury before whom the defendant is to be tried. This argument is completely groundless. The official commentary preceding Article 51, *Arraignment,* is specific with respect to the purposes of the article:

"It is the purpose of this Article not only to define arraignment in any court but also to provide for a separate time of arraignment in superior court. Time for jurors and

> witnesses will be saved if matters not requiring their presence can be disposed of before they are brought in. The Commission feels that it is important to our system of justice that unnecessary impositions on the time of citizens be avoided. Thus, in the more populous counties here defined as those having as much as 20 weeks of criminal court (and others which the Chief Justice may designate), a separate time for arraignment will be required. In other counties it is authorized on an optional basis.
>
> The Commission is under no illusion that this will cure problems of delay, or that it will end the practice of waiting until a jury is ready before entering a guilty plea, but it does set a pattern within which improvement is possible."

G.S. 15A-941 defines arraignment as "bringing a defendant in open court before a judge having jurisdiction to try the offense, advising him of the charges pending against him, and directing him to plead." It is obvious that the purpose of an arraignment is to advise the defendant of the crime with which he is charged. G.S. 15A-941 further provides that "[t]he solicitor *must* read the charges or fairly summarize them to the defendant." (Emphasis supplied.) The fact that this is done before the jury is not, as defendant contends, a violation of defendant's right to due process and equal protection as required by the Constitution of the State of North Carolina and the United States. Nor is there any merit to defendant's contention that prejudicial error resulted from the court's reading the indictment to the jury and advising the jury that the State had elected not to place the defendant on trial for murder in the first degree but would place him on trial for murder in the second degree or for such other offense as the evidence may warrant. This assignment of error is wholly without merit.

Defendant next assigns as error the court's sustaining the State's objections to a question asked defendant by his counsel as to whether he had "any knowledge of any prior incidents of Ralph Caldwell attempting to do harm to somebody," and questions of similar import. Defendant did not request that the evidence be admitted for the limited purpose of establishing the state of mind of defendant nor did he ask that the answers be placed in the record. Nevertheless, immediately thereafter he was asked: "Do you know the deceased's, Ralph Caldwell's, reputation as a dangerous and violent fighting man?" He re-

sponded "Yes"; whereupon he was asked "What was it?" His totally unresponsive answer was "Well, to my knowledge he had shot a couple and cut some." Although an objection was sustained at that point, the answer was before the jury, and he continued, "It was pretty bad as far as I knew." Obviously, defendant suffered no prejudice.

[3] Defendant's remaining assignments of error are to the charge of the court. For the most part, the defendant has selected isolated portions of the charge to which he assigns as error the court's failure to state clearly that the legal presumptions of an unlawful and malicious killing are inapplicable if the defendant acted in the heat of passion and upon adequate provocation or in self-defense. However, when this aspect of the charge is read contextually, it is clear that the court, with clarity and without confusion, instructed the jury that they were "not [to] rely upon the presumption of malice or otherwise find that malice existed unless you first find beyond a reasonable doubt that the defendant is not entitled to have the crime reduced to voluntary manslaughter or manslaughter," and further that they could not return a verdict of guilty of second-degree murder unless they first found "beyond a reasonable doubt that defendant did not act in self-defense." These instructions followed the court's having told the jury that the presumptions would be raised "if no other evidence is presented" and were preceded by the court's stating the defendant's contention that "there is evidence in this case that he acted in the heat of passion upon adequate provocation." Also, after he gave the elements of manslaughter and preceding the instruction above noted, the court stated the defendant's contention that "there is evidence in this case that he acted in self-defense." When the charge is read contextually, as we are required to do, *State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476 (1971), we think this aspect of the charge complies with the principles enunciated in *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975); and *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975).

Defendant also contends that the court erred in failing properly to place the burden of proof upon the State with respect to the elements of manslaughter, self-defense, heat of passion upon adequate provocation. Again defendant chooses only isolated portions of the charge.

"A disconnected portion may not be detached from the context of the charge and then critically examined for an interpretation from which erroneous expressions may be inferred." *State v. Bailey,* 280 N.C. 264, 268, 185 S.E. 2d 683 (1972); cert. denied 409 U.S. 948.

When it is read contextually, the charge clearly and repeatedly places the burden of proof upon the State to prove all the elements of manslaughter, substantially requires the State to disprove that the killing was done in the heat of passion upon adequate provocation, and repeatedly requires a verdict of not guilty "unless the State has satisfied you beyond a reasonable doubt that the killing was not excused by the rule of self-defense."

The court's final mandate to the jury was as follows:

" . . . in your deliberations and this is my final summary to you with reference to the charge of murder in the second degree, if you find from the evidence and beyond a reasonable doubt, the burden being on the State to so satisfy you that on October 14, of 1974, the defendant, Robert Carter, intentionally and with malice and without just cause or excuse shot Ralph Junior Caldwell, with a .25 caliber pistol, specifically the pistol introduced into evidence as State Exhibit 6, that the pistol which he shot Ralph Caldwell, if you find that it was a deadly weapon and that he thereby caused Ralph Caldwell's death, nothing else appearing, it would be your duty to return a verdict of guilty of second degree murder. However, if you do not so find or if you have a reasonable doubt as to one or more of those things, then you will not return a verdict of guilty of second degree murder.

If you do not find the defendant guilty of second degree murder, you must consider whether he is guilty of manslaughter. With reference to manslaughter, if you find, from the evidence and beyond a reasonable doubt, that on or about October 14, 1974, the defendant, Robert Carter, intentionally shot Ralph Caldwell with the .25 caliber pistol offered into evidence as State Exhibit six, that State Exhibit six is a deadly weapon, and that he thereby caused . . . proximately caused the death of Ralph Junior Caldwell, and you find or the State has failed to satisfy you to the contrary and beyond a reasonable doubt that the defendant

killed without malice, in the heat of passion, nothing else appearing or he being the aggressor without a murderous intent in bringing on the dispute with Ralph Caldwell or using excessive force in exercising his right of self-defense, then it would be your duty to return a verdict of guilty of manslaughter. However, if you do not find or if you have a reasonable doubt as to one or more of those things, then it would be your duty to return a verdict of not guilty.

In all events, you must return a verdict of not guilty unless the State has satisfied you beyond a reasonable doubt that the killing was not excused by the rule of self-defense . . . . "

This mandate indicated the requisite elements of the offenses charged, pointed out those circumstances requiring reduction of the crime from murder to manslaughter and further indicated that self-defense would excuse the defendant from all culpability. Defendant cannot complain over the trial court's handling of the difficult legal questions presented and his position is simply without merit. See: *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975); *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975); Cf: *State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974).

We have reviewed all other assignments of error and find them to be without merit.

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. PATRICIA ANN McKENZIE

No. 7620SC74

(Filed 7 July 1976)

1. Criminal Law § 154— consolidated trial of defendants — severance of cases on appeal

When the court has ordered consolidation of cases or charges for trial, counsel cannot, of his own enterprise, sever the cases or charges and appeal each separately in the absence of a showing of compelling circumstances. App. R. 11(d).

2. Criminal Law §§ 145, 154— consolidated trial of defendants — multiple records on appeal — taxing of costs against attorneys

Where attorneys appointed to represent three defendants in an appeal from a consolidated trial of defendants for the same offense caused three separate records on appeal to be filed in the appellate court, the attorneys were taxed with the costs of printing the two redundant records on appeal. App. R. 9(b)(5).

APPEAL by defendant from *Barbee, Judge.* Judgment entered 15 October 1975 in Superior Court, RICHMOND County. Heard in the Court of Appeals 6 May 1976.

Defendant was charged in a bill of indictment, proper in form, with the felony of assault with a deadly weapon with intent to kill, inflicting serious injury upon one Wesley Long on 13 July 1975.

The State's evidence tended to show the following: Wesley Long went to the Blue Bird Lounge at about 11:00 p.m. on 13 July 1975. Long did not know defendant or her husband Eugene McKenzie or Frederick Cottingham. Long went to the rest room and, upon emerging from it, was struck and knocked down by Eugene McKenzie. Long got a cue stick and pursued Eugene McKenzie into the parking lot. Once there Cottingham grabbed, held and cut Long several times with a knife. Eugene McKenzie also cut Long several times while Cottingham held Long. Long fell to the ground, and defendant jumped upon him and cut him several times with a knife. Finally Long was able to flee across the street, where he collapsed in front of Mom and Pop's Restaurant; shortly thereafter he was carried to the hospital by the rescue squad. Long sustained multiple cuts to his face and back, which required several hundred sutures to repair. Defendant offered evidence which tended to show that she did not cut Long.

The jury found defendant guilty as charged, and a prison term of twelve years was imposed.

Attorney General Edmisten, by Assistant Attorney General Robert G. Webb, for the State.

Benny S. Sharpe for the defendant.

BROCK, Chief Judge.

This case was properly consolidated for trial with similar charges against Eugene McKenzie and Frederick Cottingham.

Mr. Benny S. Sharpe was appointed to represent this appealing defendant, as well as defendant Eugene McKenzie, at trial and on appeal to this Court. Mr. Donald M. Dawkins was appointed to represent defendant Frederick Cottingham at trial and on appeal to this Court. Nevertheless, on appeal Messrs. Sharpe and Dawkins caused three separate records on appeal to be filed in this Court as cases numbers 7620SC74 (Patricia Ann McKenzie), 7620SC75 (Eugene McKenzie), and 7620SC80 (Frederick Cottingham). The costs, respectively, of printing these three records on appeal were: $150.15, $155.10, and $243.48. Since each of the defendants was found to be indigent, fees for counsel at trial and on appeal are provided by the State. Also the expenses of docketing and printing the three records on appeal and printing of the briefs are provided by the State. Even if defendants were personally paying counsel fees and court costs, the preparation of three separate records on appeal would be unnecessary expenses for counsel to incur for their clients. Furthermore, it is improper procedure for counsel to file three separate records on appeal from a trial at which the three cases were consolidated. Aside from the question of the unnecesary expenses, the filing of three separate records on appeal creates the undue burden on the appellate courts of having to read three when one would have sufficed. Rule 11(d) of the North Carolina Rules of Appellate Procedure specifically addresses this subject. It provides for a single record on appeal and the methods of accomplishing a single record on appeal.

[1] When the court has ordered consolidation of cases or charges for trial, counsel cannot, of his own enterprise, sever the cases or charges and appeal each separately in the absence of a showing of compelling circumstances. Clearly the fact of indigency should not be considered by a defendant as a license to be a spendthrift with taxpayers' money. *State v. Squires*, 1 N.C. App. 199, 160 S.E. 2d 550 (1968).

Rule 9(b)(5) of the North Carolina Rules of Appellate Procedure provides: "It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion."

[2] By appealing these three cases separately, counsel has prepared and caused to be printed two redundant records on

appeal; these records on appeal constitute matter not necessary for an understanding of the errors assigned. There has been no showing of compelling circumstances to justify the filing of three records on appeal instead of one. Consequently, counsel, Mr. Benny S. Sharpe, will be personally taxed with costs in the sum of $150.00. In *State v. Cottingham,* in an opinion filed contemporaneously herewith, counsel, Mr. Donald M. Dawkins, will be personally taxed with costs in the sum of $150.00.

Upon the merits of the appeal in this case, we have fully examined defendant's assignments of error and find them to be without merit. In our view defendant received a fair trial free from prejudicial error.

No error.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. FREDERICK JAMES COTTINGHAM

No. 7620SC80

(Filed 7 July 1976)

1. **Criminal Law §§ 145, 154— consolidated trial of defendants — multiple records on appeal — taxing of costs against attorneys**

Where attorneys appointed to represent three defendants in an appeal from a consolidated trial of defendants for the same offense caused three separate records on appeal to be filed in the appellate court, the attorneys were taxed with the costs of printing the two redundant records on appeal. App. R. 9(b)(5).

2. **Criminal Law § 92— consolidation of cases against three defendants**

Cases against three defendants charged with the same offense were properly joined for trial although the solicitor's motion was not in writing. G.S. 15A-926(b)(2).

3. **Criminal Law § 92— consolidation of cases for trial — absence of motion**

Even in the absence of any motion, the trial judge may direct that criminal cases be consolidated for trial where proper grounds for joinder exist and when to do so will promote the ends of justice and facilitate proper disposition of the cases on the docket before him.

4. Criminal Law § 113— consolidated trial — instructions — consideration of guilt or innocence of each defendant separately

The trial court's instructions in a consolidated trial of three defendants could not have misled the jury into believing that if they found one or more of the defendants guilty they were to find all three guilty; furthermore, any possible question as to this was removed when, after the jury foreman announced that the jury "combined it all and found all parties guilty as charged," the court refused to accept the foreman's statement as a verdict, again instructed the jury as to the permissible verdicts as to each defendant and told them that they must return a verdict as to each defendant, and the jury thereafter returned a verdict as to each defendant.

APPEAL by defendant from *Barbee, Judge.* Judgment entered 15 October 1975 in Superior Court, RICHMOND County. Heard in the Court of Appeals 6 May 1976.

Defendant Cottingham was charged in a bill of indictment, proper in form, with the felony of assault with a deadly weapon with intent to kill, inflicting serious injury upon one Wesley Long. By separate indictments Eugene McKenzie and his wife, Patricia Ann McKenzie, were charged with the same offense. The three cases were joined for trial.

The State's evidence showed the following: Wesley Long went to the Blue Bird Lounge about 11:00 p.m. on 13 July 1975. He did not know defendant Cottingham or either of the McKenzies. Long went to the rest room and upon emerging from it was struck and knocked down by Eugene McKenzie. Long got a cue stick and pursued Eugene McKenzie into the parking lot. Once there Cottingham grabbed, held, and cut Long several times with a knife. Eugene McKenzie also cut Long several times while Cottingham held Long. Long fell to the ground, and Patricia Ann McKenzie jumped upon him and cut him with a knife. Finally Long was able to flee across the street, where he obtained help. He was taken to the hospital by the rescue squad. Long sustained multiple cuts to his face and back which required several hundred stitches to repair. One cut through the wall of his chest cut his diaphragm and exposed his lung and kidney. He remained in the hospital until 22 July 1975.

Defendant Cottingham testified that he saw Long hit Eugene McKenzie with the cue stick, that he grabbed Long and took the stick from him, that he hit Long with the stick, but that he did not cut Long. Defendant's witnesses corroborated his version of the occurrence.

Defendant was found guilty as charged and sentenced to twelve years in prison.

Attorney General Edmisten by Assistant Attorney General James E. Magner, Jr. for the State.

Pittman, Pittman & Dawkins by Donald M. Dawkins for defendant appellant.

PARKER, Judge.

[1] This is an appeal by the defendant, Frederick James Cottingham, from the same trial at which his co-defendants, Eugene McKenzie and Patricia Ann McKenzie, were also found guilty. Each of the three defendants appealed. Their attorneys caused three separate records on appeal to be filed in this Court. There should have been but one. Rule 11(d), North Carolina Rules of Appellate Procedure. For the reasons stated by Chief Judge Brock in the opinion in *State v. Patricia Ann McKenzie,* case No. 7620SC74, which is filed contemporaneously herewith, defendant Cottingham's court appointed attorney, Mr. Donald M. Dawkins, will be personally taxed with costs in the sum of $150.00.

[2, 3] Defendant Cottingham assigns error to the consolidation of the three cases for trial. Since each defendant was charged with the same offense, the cases were properly joined for trial. G.S. 15A-926(b)(2). The solicitor did not file a written motion for joinder, but appellant has shown no way in which he was prejudiced because the motion was not in writing. Even in the absence of any motion, the trial judge may direct that criminal cases be consolidated for trial where, as here, proper grounds for joinder exist and when to do so will promote the ends of justice and facilitate proper disposition of the cases on the docket before him.

Defendant presents a number of assignments of error directed to the court's rulings sustaining objections to questions asked by defense counsel of certain witnesses. The record does not show what the answers would have been had the witnesses been permitted to answer. Therefore we cannot know whether the rulings were prejudicial. The burden is on appellant not only to show error but to show prejudicial error. *State v. Robinson,* 280 N.C. 718, 187 S.E. 2d 20 (1972).

[4] Defendant assigns error to portions of the court's charge to the jury which he contends encouraged the jury to treat all three defendants in the same manner. It is true, of course, that "when two or more defendants are jointly tried for the same offense, a charge which is susceptible to the construction that the jury should convict all if it finds one guilty is reversible error." *State v. Tomblin,* 276 N.C. 273, 276, 171 S.E. 2d 901, 903 (1970). Examination of the charge in the present case, however, reveals that the jury was clearly instructed to reach a separate verdict as to each defendant. The judge separately stated each particular charge as to each defendant and instructed as to the applicable law on each offense. The jury could not have been misled into believing that if they found one or more of the defendants guilty they were to find all three guilty. Any possible question as to this was removed when, after the foreman of the jury announced, "Your honor, we combined it all and found all parties guilty as charged," the judge properly refused to accept the foreman's statement as a verdict. Instead, he reinstructed the jury, again clearly informing them as to the permissible verdicts as to each defendant and instructing them that they "must return a verdict as to each defendant." The jury was then sent back to the jury room, and on return the foreman correctly announced the verdict as to each defendant. Thereafter, on motion of the attorneys for the defendants, the jury was polled, and all members of the jury agreed that the separate verdicts announced by their foreman were their verdicts and that they still assented thereto.

We have carefully examined all of defendant's remaining assignments of error, and in the trial and in the judgment appealed from find

No error.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. ROBERT PEARL BRYSON

No. 7630SC192

(Filed 7 July 1976)

1. **Criminal Law §§ 145, 154— consolidated trial of defendants — two records on appeal — inclusion of unnecessary material — taxing of costs against attorneys**

Where attorneys appointed to represent three defendants in an appeal from a consolidated trial of defendants for the same offenses filed two records on appeal instead of one and included unnecessary material in each of the records filed, each attorney will be personally taxed with a portion of the costs. App. R. 9(b)(5).

2. **Criminal Law § 92— consolidation of cases for trial**

Cases against three defendants charged with the same offenses were properly consolidated for trial although the solicitor's motion was not in writing. G.S. 15A-926(b)(2).

3. **Criminal Law § 15; Jury § 2— change of venue — special venire — pretrial publicity — other unsolved crimes**

In a prosecution for breaking and entering, larceny, and safecracking, the trial court did not abuse its discretion in the denial of defendants' motions for change of venue or in the alternative for a special venire from another county on the ground of publicity and the large number of unsolved breakings and enterings which had been committed in the county during the period immediately preceding the arrest of defendants.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 30 October 1975 in Superior Court, CHEROKEE County. Heard in the Court of Appeals 9 June 1976.

By indictments, proper in form, defendant Bryson was charged with (1) felonious breaking and entering on 8 August 1975 and felonious larceny after such breaking and entering of a building occupied by Richard Howell doing business as Howell's Market, and (2) safecracking on 8 August 1975 of a safe belonging to Richard Howell. By separate indictments Lloyd Calvin Ashe and Hilliard Prince Ashe were charged with the same offenses. The cases against the three defendants were joined for trial.

The State's evidence showed the following: At 6:00 p.m. on 7 August 1975 Richard Howell, owner of Howell's Market in downtown Murphy, closed and locked his place of business. When the store was opened at 8:00 o'clock the next morning, it was found that the building had been broken into, a safe

belonging to Howell containing approximately $2000.00 in cash had been removed therefrom, and approximately 350 cartons of cigarettes were missing.

The State's witness, Marsha Bowers, testified that in the early morning of 8 August 1975 she, defendants Bryson, Lloyd Calvin Ashe, Hilliard Prince Ashe, and two women met and planned to break in Howell's Market. The men were to break into the market and the women were to pick them up later in a truck. Bowers testified she arrived with the truck at the back of the store at approximately 5:25 a.m., and defendant Bryson, with the other two men, loaded a safe and cigarettes onto the truck. They drove to a fruit stand, where they unloaded the cigarettes, then drove to Forest Service property, where the safe was broken open with a chisel and the money taken therefrom.

Defendant Bryson did not present evidence. The defendants Lloyd Ashe and Hilliard Ashe presented evidence which tended to establish alibies and also presented evidence tending to discredit the State's witness, Marsha Bowers.

The jury found defendant Bryson guilty of felonious larceny and of safecracking. From judgment imposing prison sentences, he appealed.

Attorney General Edmisten by Associate Attorney William H. Guy for the State.

William A. Hoover, Jr. for defendant appellant.

PARKER, Judge.

[1] Defendant Bryson was tried jointly with Lloyd Ashe and Hilliard Ashe. All three were found guilty and all appealed. Their court appointed attorneys caused two separate records on appeal to be filed in this Court. There should have been but one. Rule 11(d), North Carolina Rules of Appellate Procedure. In addition, the attorneys included in both of the records on appeal matter not necessary for an understanding of the errors assigned. For example, in the record filed by the attorney representing defendant Bryson there is included the entire charge of the court to the jury although no assignment of error is made by any of the three appellants to any portion of the charge. In the record filed by the attorney representing defendants Ashe

there are included copies of safekeeping orders and of orders authorizing the furnishing of transcripts at State expense, matters which have no bearing on the errors assigned. The filing of two records when there should have been but one and the inclusion in both records of matter which should not have been included has placed an unnecessary burden on this Court and has imposed upon the State an expense which was not necessary for the protection of defendants' rights to full appellate review. See opinion of Chief Judge Brock in *State v. Patricia Ann McKenzie,* Case No. 7620SC74, which is filed contemporaneously herewith.

Rule 9(b)(5) of the North Carolina Rules of Appellate Procedure is as follows:

> "(5) *Inclusion of Unnecessary Matter: Penalty.* It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion."

Because counsel representing defendant Bryson and counsel representing defendants Ashe filed two records instead of one and because they included unnecessary material in each of the records filed, each counsel will be personally taxed with a portion of the costs.

[2] Since each of the three defendants was charged with the same offenses, the cases were properly joined for trial, G.S. 15A-926(b)(2). Appellants have failed to show any way in which any of them was prejudiced because the solicitor's motion for joinder was not in writing. Accordingly, appellants' assignments of error directed to the court's action in consolidating the cases for trial are overruled. *See State v. Cottingham,* 30 N.C. App. 67, 226 S.E. 2d 387 (Case No. 7620SC80, opinion filed contemporaneously herewith.)

[3] Appellants assign error to the denial of their motions for change of venue or in the alternative for a special venire to be drawn from another county. The motions were made on the ground that because of publicity and because of the large number of unsolved breakings and enterings which had been committed in Cherokee County during the period immediately preceding the arrest of the defendants, the defendants could

not in this case receive a fair trial in Cherokee County. Such motions are addressed to the sound discretion of the trial judge, and hs ruling thereon will not be reviewed on appeal absent a showing of abuse of discretion. *State v. Mitchell,* 283 N.C. 462, 196 S.E. 2d 736 (1973). No abuse of discretion has been here shown.

We have carefully considered all of the remaining assignments of error, and we find no error. There was ample evidence to warrant submitting the cases to the jury, and defendants' motions for nonsuit were properly denied. In the trial and judgments appealed from we find

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. LLOYD CALVIN ASHE AND HILLARD PRINCE ASHE

No. 7630SC210

(Filed 7 July 1976)

Criminal Law §§ 145, 154— consolidated trial of defendants — two records on appeal — inclusion of unnecessary material — taxing of costs against attorneys

Where attorneys appointed to represent three defendants in an appeal from a consolidated trial of defendants for the same offenses filed two records on appeal instead of one and included unnecessary material in each of the records filed, each attorney will be personally taxed with a portion of the costs. App. R. 9(b)(5).

APPEAL by defendants from *Thornburg, Judge.* Judgments entered 30 October 1975 in Superior Court, CHEROKEE County. Heard in the Court of Appeals 10 June 1976.

Attorney General Edmisten by Associate Attorney General David S. Crump.

McKeever, Edwards, Davis & Hays by Franklin R. Plummer for defendant appellants.

PARKER, Judge.

This appeal is from the same trial as is reported in *State v. Bryson,* 30 N.C. App. 71, 226 S.E. 2d 392 (Case No.

7630SC192, opinion filed contemporaneously herewith.) Defendants raise the same questions for review as are presented in *State v. Bryson, supra.* For the reasons stated in the opinion in that case, we find no error.

Because of the filing of an unnecessary record on appeal and because unnecessary matter was included in the records filed, counsel for defendants will be personally taxed with a portion of the costs. Rule 9(b)(5) of the North Carolina Rules of Appellate Procedure; *State v. Bryson, supra.*

No error.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. JOSEPH D. CHAVIS

No. 7616SC174

(Filed 7 July 1976)

1. **Criminal Law §§ 145, 154— appeal from trial of two defendants — two records on appeal — taxing of costs against attorneys**

Where attorneys representing two defendants in an appeal from a consolidated trial of both defendants for the same offense caused two separate records on appeal to be filed in the appellate court instead of one record, each attorney will be personally taxed with a portion of the costs of the unnecessary record. App. R. 9(b)(5).

2. **Criminal Law § 105— motion for nonsuit — effect of introducing evidence**

Defendant, by introducing evidence, waived his right to except on appeal to the denial of his motion for nonsuit made at the close of the State's evidence.

3. **Homicide § 21— second degree murder — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for second degree murder where it would support a jury finding that defendant intentionally used a deadly weapon and thereby caused the victim's death.

4. **Homicide § 32— conviction of manslaughter — submission of second degree murder — harmless error**

Defendant's conviction of voluntary manslaughter rendered harmless error, if any, in the submission of the question of defendant's guilt of second degree murder, at least absent any showing that the verdict of guilty of the lesser offense was affected thereby.

5. Criminal Law § 132— motion to set aside verdict — discretion of court

A motion to set aside the verdict as being against the greater weight of the evidence is addressed to the discretion of the trial court, and the court's refusal to grant the motion is not reviewable on appeal.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 16 October 1975 in Superior Court, ROBESON County. Heard in the Court of Appeals 27 May 1976.

By bill of indictment in the form authorized by G.S. 15-144, defendant Chavis was charged with the murder on 27 October 1974 of one Louis H. Lowery. By separate indictment Allen Pevia was charged with the same offense. The two cases were joined for trial. The state elected to try defendants only for murder in the second degree, to which charge both defendants pled not guilty.

The State's evidence showed that on Sunday afternoon, 27 October 1974, defendants Chavis and Pevia, after being told that Louis Lowery was at Redell Locklear's house, went to Locklear's house, which was a bootleg joint. Theodore Graham, a witness for the State, testified that he and Louis Lowery were standing at the bar drinking beer when he heard a sound "like somebody slapped somebody." He turned around and saw Chavis holding a pistol in his hand. Pevia was standing behind Chavis, holding a shotgun and waving it back and forth. Graham heard Chavis say that "he was sick of that God damn shit," and he saw Chavis fire the pistol twice, these two shots being fired past Louis Lowery's head. Something fell to the floor, and Chavis reached down. When he stood up, he was holding two pistols, one in each hand. Louis Lowery walked toward Chavis, and Chavis fired. Blood gushed from Louis Lowery's chest. At this time, Lowery had no weapon. Chavis and Pevia then left, Chavis being the first to go out the door and Pevia following. As Pevia went out the door, he had the shotgun in his hand pointed back toward the persons in the house.

Lowery was taken to the hospital, but died before arriving. The pathologist who conducted the autopsy testified that Lowery died as a result of gunshot wounds in his heart. A .22 caliber bullet was recovered from his body.

Defendant Chavis testified that as he entered the Locklear house, Lowery grabbed him by the neck "like wrestling on

television"; that he broke loose from Lowery but Lowery pursued him; that as Lowery was pulling a gun out of his pocket and they were tusseling in front of the bar, the gun went off while it was in Lowery's hand; that at this time he heard other gunshots in the room.

Defendant Pevia did not present evidence.

The jury found both defendants guilty of voluntary manslaughter, and from judgments imposing prison sentences, both appealed.

Attorney General Edmisten by Assistant Attorney General Richard F. Kane for the State.

L. J. Britt & Son by Luther J. Britt, Jr., and Bruce W. Higgins for defendant Chavis, appellant.

PARKER, Judge.

[1] The attorneys for defendants Chavis and Pevia have caused two separate records on appeal to be filed in this Court. There should have been but one. Rule 11(d), North Carolina Rules of Appellate Procedure. Each counsel will be personally taxed with a portion of the costs of the unnecessary record. Rule 9(b)(5) of the Rules of Appellate Procedure; see opinion of Chief Judge Brock in *State v. Patricia Ann McKenzie,* Case No. 7620SC74, which is filed contemporaneously herewith.

[2] On appeal of defendant Chavis, counsel first contends that the court erred in denying the defendant's motion to direct a verdict for defendant at the close of the State's evidence as to the charge of second degree murder. "In a criminal case the proper motion to test the sufficiency of the State's evidence to carry the case to the jury is a motion to dismiss the action or a motion for judgment as in the case of nonsuit, pursuant to G.S. 15-173." *State v. Everette,* 284 N.C. 81, 84 199 S.E. 2d 462, 465 (1973). We shall treat defendant's motion for a directed verdict as having been a motion for judgment as in case of nonsuit. In this case, defendant Chavis introduced evidence. By so doing he waived his right to except on appeal to the denial of his motion for nonsuit made at the close of the State's evidence. G.S. 15-173; *State v. Rigsbee,* 285 N.C. 708, 208 S.E. 2d 656 (1974); *State v. Paschall,* 14 N.C. App. 591, 188 S.E. 2d 521 (1972). On this appeal, therefore, we consider only defendant Chavis's second motion, made at the close of all the evidence.

[3] When all of the evidence is viewed in the light most favorable to the State and when all discrepancies and contradictions are resolved in favor of the State, we find the evidence was amply sufficient to support a jury finding that Chavis intentionally used a deadly weapon and thereby caused the death of Lowery. "When the killing with a deadly weapon is admitted or established, two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree." *State v. Gordon,* 241 N.C. 356, 358, 85 S.E. 2d 322, 323 (1955). These traditional presumptions are still valid. *State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575 (1975). There was no error in submitting the charge of second-degree murder to the jury.

[4] While we hold that the evidence was amply sufficient to justify submitting second-degree murder as a possible verdict, we point out that defendant's conviction of voluntary manslaughter would render harmless an error, had any error been committed, in submitting to the jury the question of defendant's guilt of the more serious offense, at least absent any showing that the verdict of guilty of the lesser offense was affected thereby. "It has long been recognized in this State that submission of a question regarding the guilt of a defendant of murder in the second degree became harmless when the jury returned a verdict of manslaughter." *State v. Bryant,* 282 N.C. 92, 101, 191 S.E. 2d 745, 751 (1972).

Defendant's second argument, that the court erred in denying his motions made at the close of all of the evidence for a directed verdict as to manslaughter and to dismiss all charges against him, is without merit. The evidence for the defense tending to show that defendant Chavis did not shoot Lowery and that in resisting Lowery's attack he acted in self-defense was for the jury to evaluate. Viewed in the light most favorable to the State, the evidence was amply sufficient to warrant submitting the case to the jury and to support the verdict rendered.

[5] Finally, defendant Chavis contends that the court erred in denying his motion to set aside the verdict as being against the greater weight of the evidence. "A motion to set aside the verdict as being against the greater weight of the evidence is addressed to the discretion of the trial court, and the court's refusal to grant the motion is not reviewable on appeal." *State v. Dull,* 289 N.C. 55, 62, 220 S.E. 2d 344, 348 (1975).

On the appeal of defendant Chavis we find

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. ALLEN PEVIA

No. 7616SC179

(Filed 7 July 1976)

1. **Criminal Law §§ 145, 154— unnecessary record filed on appeal — costs taxed to attorneys**

Where defendant was tried jointly with another and the attorneys for the two defendants caused two separate records on appeal to be filed in the Court of Appeals when there should have been but one, each counsel will be personally taxed with a portion of the costs of the unnecessary record. Rule 9(b)(5), Rules of Appellate Procedure.

2. **Constitutional Law § 31— failure to inform defendant of evidence — no denial of due process**

The prosecution did not wrongfully suppress evidence in violation of defendant's right to due process where the evidence was not requested by the defense and was only remotely favorable to the defense; moreover, the evidence was in fact presented to the jury when a codefendant called a State's witness to the stand, and the fact that the evidence came before the jury in this fashion rather than by cross-examination of the witness when he was testifying for the State did not result in a denial of due process such as either to require dismissal of the charges or the granting of a new trial.

3. **Criminal Law § 92— defendants charged with same crime — joinder proper**

The trial court did not err in allowing the State's motion to join defendant's trial with that of his codefendant where both were charged with the same offense, even though the district attorney's original motion was not in writing. G.S. 15A-926(b)(2).

4. **Criminal Law § 165— objections to remarks of counsel — time for making**

Objections to improper remarks by counsel during argument to the jury should be made before the case is submitted to the jury, and except in capital cases such objections must be made in apt time or else be lost, unless the impropriety be so gross as to require action by the court on its own initiative to preserve the defendant's right to a fair trial.

5. Homicide § 21— fatal shots fired by companion — sufficiency of evidence of defendant's guilt

In a prosecution for second degree murder, evidence was sufficient to be submitted to the jury where it tended to show that defendant, armed with a shotgun, accompanied his codefendant to the scene of the fatal shooting, that he stood there behind the codefendant, brandishing the shotgun, as the codefendant fired the fatal shots at the victim, and that defendant then left the scene with the codefendant, pointing the shotgun back at the persons in the house as he did so.

6. Criminal Law § 168— jury instructions — misstatement of party's contention — necessity for calling attention of trial court to

Any misstatement of a contention of one of the parties by the trial court in instructing the jury will be deemed waived unless called to the attention of the trial court in apt time to permit a correction.

APPEAL by defendants from *McLelland, Judge.* Judgment entered 16 October 1975 in Superior Court, ROBESON County. Heard in the Court of Appeals 7 June 1976.

Attorney General Edmisten by Associate Attorney Nonnie F. Midgette for the State.

William S. McLean for defendant Allen Pevia, appellant.

PARKER, Judge.

[1] Defendant Allen Pevia appeals from judgment imposing a prison sentence entered upon a verdict finding him guilty of the voluntary manslaughter of Louis Lowery. He was tried jointly with one Chavis, and this is an appeal from the same trial as is reported in *State v. Chavis,* 30 N.C. App. 75, 226 S.E. 2d 389 (Case No. 7616SC174, opinion filed contemporaneously herewith.) The attorneys for defendants Pevia and Chavis caused two separate records on appeal to be filed in this Court. There should have been but one. Rule 11(d), Rules of Appellate Procedure. Each counsel will be personally taxed with a portion of the costs of the unnecessary record. Rule 9(b)(5), Rules of Appellate Procedure. The evidence presented at the trial is summarized in the opinion in *State v. Chavis, supra,* and will not be repeated here.

[2] Defendant Pevia first assigns error to the court's denial of his motion to dismiss all charges against him for failure of the State to inform him prior to the trial that a certain .38 caliber pistol, which was delivered by his co-defendant Chavis to his parole officer on the day following the shooting, was

the property of the State's only eye-witness, Theodore Graham. The State did not introduce any evidence concerning this .38 caliber pistol, its evidence tending to show that Lowery, the victim of the shooting, died as a result of a .22 caliber bullet wound. The evidence concerning the .38 came from the co-defendant, Chavis, who testified the .38 was the pistol which was in the hands of Louis Lowery when the shooting occurred. The significance of the evidence that the .38 belonged to the State's witness, Graham, thus appears to lie in such tendency as it might have to show that the .38 was in fact carried to the scene of the shooting by Graham's friend, Lowery, who had ridden to the scene in Graham's automobile in which Graham had last seen the pistol prior to the shooting.

In his brief, counsel for defendant Pevia acknowledges that he was aware prior to the trial that the autopsy report showed that Lowery's death resulted from a .22 caliber gunshot wound and that the pistol delivered to the parole officer by Chavis was a .38 caliber pistol. He contends that in addition he was entitled to be informed by the State prior to the trial as to any evidence it possessed concerning ownership of the .38. Citing *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963), he contends that the State's failure to disclose such evidence prior to trial amounted to suppression of evidence by the prosecution in violation of his Constitutional rights to due process such as to require dismissal of the charge against him. We do not agree.

The State's duty of disclosure under the *Brady* decision was formulated by our own Supreme Court in *State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973) as follows (at p. 45):

> "The standards enunciated in *Brady* by which the solicitor's conduct in this case is to be measured require us to determine whether there was (a) suppression by the prosecution AFTER A REQUEST by the defense (b) of MATERIAL EVIDENCE (c) FAVORABLE to the defense . . . . 'We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.' *Moore v. Illinois*, 408 U.S. 786, 33 L.Ed. 2d 706, 92 S.Ct. 2562 (1972)."

In *United States v. Agurs*, ... U.S. ..... (opinion filed 24 June 1976), the United States Supreme Court has recently re-examined the prosecution's duty of disclosure as measured by the

defendant's right to a fair trial mandated by the due process clauses of the Fifth and Fourteenth Amendments, and in so doing pointed out that the "mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in a constitutional sense."

In the case now before us the evidence which defendant Pevia contends the State wrongfully suppressed was not requested by the defense and in any event was only remotely favorable to the defense. Moreover, the evidence was in fact presented to the jury when the co-defendant Chavis called the State's witness Graham to the stand. That the evidence came before the jury in this fashion rather than by cross-examination of Graham when he was testifying as a witness for the State clearly did not result in a denial of due process such as either to require dismissal of the charges or the granting of a new trial. Defendant Pevia's first assignment of error is overruled.

[3] Defendant Pevia's second assignment of error is directed to the court's action in allowing the State's motion to join his trial with that of his co-defendant, Chavis, and in denying his several motions made during the course of the trial that he be granted a separate trial. We find no error. Since Chavis and Pevia were charged with the same offense, the cases were properly joined for trial. G.S. 15A-926(b)(2). Appellant Pevia has shown no way in which he was prejudiced because the District Attorney's motion when originally made was not in writing but was only later reduced to writing. Even in the absence of any motion, the trial judge may direct that criminal cases be consolidated for trial where, as here, proper grounds for joinder exist and when to do so will promote the ends of justice and facilitate proper disposition of the cases on the docket before him. *State v. Cottingham,* 30 N.C. App. 67, 226 S.E. 2d 387 (Case No. 7620SC80, opinion filed contemporaneously herewith). Appellant's second assignment of error is overruled.

Appellant next assigns error to the court's failure to correct on its own motion what appellant contends were improper comments made by the district attorney during his argument to the jury. This assignment of error is based upon appellant's exceptions numbers 8 through 27, each of which is directed to a different portion of the district attorney's jury

argument. The record reveals, however, that in only one instance, which is the subject of appellant's exception number 27, did defense counsel object, and in that instance the trial judge sustained the objection. The record fails to show any objection interposed at the trial to the portions of the district attorney's remarks which are the subject of appellant's exceptions 8 through 26.

[4] Objections to improper remarks by counsel during argument to the jury should be made before the case is submitted to the jury, *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568 (1968), and except in capital cases such objections, "like those to the admission of incompetent evidence, must be made in apt time or else be lost," *State v. Williams,* 276 N.C. 703, 712, 174 S.E. 2d 503, 510 (1970), unless the impropriety be so gross as to require action by the court on its own initiative to preserve the defendant's right to a fair trial. *State v. Smith,* 240 N.C. 631, 83 S.E. 2d 656 (1954). Upon a careful review of the present record we find no such impropriety in the argument of the State's attorney as to have required the interference of the trial court on its own initiative in order to preserve appellant's right to a fair and impartial trial.

[5] The State's evidence would support a jury finding that defendant Pevia, armed with a shotgun, accompanied his co-defendant Chavis to the scene of the fatal shooting, that he there stood behind Chavis, brandishing the shotgun, as Chavis fired the fatal shots at Lowery, and that he then left the scene with Chavis, pointing the shotgun back at the persons in the house as he did so. On such findings defendant Pevia would be equally guilty with his co-defendant, and there was no error in the court's denial of his motion for nonsuit.

[6] Appellant Pevia contends the court committed error in its charge to the jury when it instructed as follows: "The defendant Pevia contends that you should find the facts to be as the witnesses for the defendant Chavis have testified; that he was not present when the shooting took place; that he took no part in that shooting." Defendant concedes that the charge as stated was favorable to him but asserts that it is also subject to an interpretation that defendant Pevia adopted all the testimony that defendant Chavis had presented. We find no error. It is well settled that any such misstatement of a contention will be deemed waived unless called to the attention of the

trial court in apt time to permit a correction. *State v. Williams*, 279 N.C. 515, 184 S.E. 2d 282 (1971).

We have carefully examined all of appellant's remaining assignments of error, and in the trial and judgment appealed from we find

No error.

Judges HEDRICK and ARNOLD concur.

LOWE'S OF SHELBY, INC. v. JOHN J. HUNT, AND WIFE, RUBY C. HUNT

No. 7623SC66

(Filed 7 July 1976)

Landlord and Tenant § 19— percentage of sales as additional rent — sales at another location

Provision of a lease agreement requiring the lessee to pay an additional rental of one-half percent of "all sales" in excess of $900,000 did not apply to sales made by the lessee at another location between the time the lessee moved out of the leased premises and the termination date of the lease where the lease did not require the lessee to conduct its business on the leased premises for the full term of the lease.

APPEAL by defendants from *McConnell, Judge.* Judgment entered 11 December 1975, Superior Court, WILKES County. Heard in the Court of Appeals 22 January 1976.

This is an action under the Uniform Declaratory Judgment Act requesting court interpretation of a written lease wherein defendants leased a certain store building in Shelby to plaintiff. The lease agreement, dated 1 August 1969, recited that an existing lease expired 31 July 1969; that the lease period was five (5) years subject to three (3) additional five (5) year options; and that the leased property (particularly described) was located three (3) miles east of Shelby on the south side of U. S. Highway 74 By-Pass. The rental paragraph provided for $9,000.00 per year for the first five (5) years of the lease, and further provided:

" . . . In addition to the rental set out above, in the event the sales for the fiscal year of Lowe's of Shelby, Inc. shall

exceed NINE HUNDRED THOUSAND AND NO/100 DOLLARS ($900,000.00), the Lessee will pay as additional rental one-half per cent of all sales in excess of NINE HUNDRED THOUSAND AND NO/100 DOLLARS ($900,000.00) for the original term of this lease and any extensions thereof, if any. By way of illustration only, if the sales for a fiscal year equal ONE MILLION SIX HUNDRED THOUSAND AND NO/100 DOLLARS ($1,600,000.00), then the additional rental for the year will be THREE THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($3,500.00)."

Also included in the lease agreement was a provision for $3,000.00 liquidated damages if plaintiff failed to exercise its option to renew, and provisions that the leased premises could be used for any lawful purpose, and that plaintiff "shall have the right to sublet the premises or to assign this lease or any part thereof."

Plaintiff occupied the premises until 31 August 1973, when it moved to a new location.

Plaintiff admits liability for $3,000.00 liquidated damages and for the additional rental based on sales during the month of August 1973, in the sum of $1,319.73, but defendants in their cross-complaint allege that plaintiff is liable for additional rental based on sales made by plaintiff at its new location between 31 August 1973, and 31 July 1974, the termination date of the lease, in the sum of $16,072.50, one-half per cent of sales in the total sum of $4,114,573.00.

After hearing, the trial court entered judgment for plaintiff, limiting defendants' recovery to $3,000.00 liquidated damages and $1,319.73 additional rental based on August 1973 sales. Defendants appeal.

McElwee, Hall & McElwee by W. H. McElwee for plaintiff appellee.

Horn, West, Horn & Wray by J. A. West for defendant appellants.

CLARK, Judge.

This appeal presents the following issue: Does the lease agreement of 1 August 1969, providing for payment of additional rental of one-half per cent of all sales in excess of

$900,000, apply to sales made at plaintiff's new location between 31 August 1973, when plaintiff moved out of the leased premises, and 31 July 1974, the termination date of the lease?

The defendants contend that the provision in the lease for additional rental based on percentage of sales plainly states that it applies to "all sales" in excess of $900,000.00, and relies on the basic rule of contract law that a contract is to be interpreted as written, and "if there be no dispute in respect to the terms of the contract and they are plain and unambiguous, there is no room for construction." *Kohler v. Construction Co.*, 20 N.C. App. 486, 490, 201 S.E. 2d 728, 731 (1974).

On the other hand, the plaintiff relies on the landmark case of *Jenkins v. Rose's Stores, Inc.*, 213 N.C. 606, 197 S.E. 174 (1938). The lease provided for a guaranteed "minimum rental of $2400" per year and "five per cent (5%) of the gross sales made by the store operating in said building" during the year. Defendant, after renewing the lease for the year of 1936, did not operate any store or business in the demised premises, but conducted its business in another location. Defendant paid the "minimum rental" of $2400.00 for the year of 1936, but plaintiff sought to recover an additional rental under the percentage of sales provision. It was held that since "the lease fails to show any stipulation or agreement requiring the defendant to operate a store in the demised premises" and the plaintiffs "very completely protected their interests in any contingency by requiring a fixed minimum rental," the $2400.00 paid by defendant was in full settlement of the rent due.

We note that in *Jenkins* the percentage of sales provision in the lease included the language "sales made by the store operating in said building," but in the case before us the lease provides for a percentage of "all sales" in excess of $900,000.00. However, apart from the "Rental" paragraph, there are other provisions in the lease agreement which make it clear that the plaintiff was not required to conduct business on the premises for the full term of the lease. The "Use of Premises" paragraph provides that the leased premises may be used for any lawful purpose, and the "Sublease" paragraph provided that plaintiff "shall have the right to sublet the premises or to assign this lease or any part thereof." The *Jenkins* case, if not controlling, is highly persuasive. *Sub judice*, it is apparent that the lease agreement did not require plaintiff to occupy or operate its

business in the leased premises during the lease term or in any other location within the trading area; if it elected to vacate and cease operations, plaintiff was required to pay only the fixed rental and not the additional sales percentage rental. Having this option, the lease agreement, reasonably interpreted, does not require payment of the sales percentage rental where plaintiff elected to vacate the premises and operate its business in a new location.

Law review commentators have vigorously attacked *Jenkins*, crediting it with the development of the "substantial minimum rental" doctrine. See 72 Columbia L. Rev. 625; 61 Harv. L. Rev. 317 (1948); 60 Nw. U. L. Rev. 677 (1965); 33 Tex. L. Rev. 530 (1955). However, we do not concede, as these commentators announce, that the decision in *Jenkins* is founded on the premise that the primary rental obligation under the lease is the fixed rental and the sales percentage rental merely a "bonus." These rental provisions are not controlling but must be considered with all other applicable provisions of the lease agreement in determining whether the lease requires payment of percentage rental if the lessee vacates the leased premises and moves to a new location. See *Masciotra v. Harlow*, 105 Cal. App. 2d 376, 233 P. 2d 586 (1951); *Tuttle v. W. T. Grant Co.*, 5 N.Y. App. Div. 2d 370, 171 N.Y.S. 2d 954, aff'd. 204 N.Y.S. 2d 124 (1960).

The judgment of the trial court, which limited defendants' recovery to liquidated damages in the sum of $3,000.00 and to $1,319.73 additional rental based on sales in August 1973, is

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

DURAL GUYTON AND WIFE ESTHER SUE GUYTON v. NORTH CAROLINA BOARD OF TRANSPORTATION

No. 7513SC905

(Filed 7 July 1976)

1. **Eminent Domain § 2; Highways and Cartways § 5— abutting landowner — right of access — easement**

The owner of land which abuts a highway is recognized to have a special right of easement in the highway for access purposes, and

this is a property right which cannot be taken from him without just compensation.

2. **Highways and Cartways § 6— removal of road by Board of Transportation — no abuse of discretion**

Action of defendant Board of Transportation in attempting to excavate and remove the old roadway of N. C. Highway 133 after construction of a bridge and new section of the highway did not amount to an oppressive and manifest abuse of defendant's discretionary authority in violation of G.S. 136-54, though the plaintiffs contended that the old roadway afforded them the only means of vehicular ingress and egress to and from their property.

3. **Injunctions § 2— adequate remedy at law — no injunction**

Where there is a complete, full and adequate remedy at law, the equitable remedy of injunction will not lie.

APPEAL by plaintiffs from *Preston, Judge.* Order entered 23 June 1975 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 20 February 1976.

This is an appeal from denial of plaintiffs' motion for a temporary restraining order.

Plaintiffs instituted this action against defendant, North Carolina Board of Transportation, seeking a temporary restraining order and a permanent injunction preventing defendant from excavating or removing a portion of old N. C. Highway No. 133 as the same abutted lands claimed by plaintiffs. Plaintiffs alleged in their complaint that they are the owners in fee simple of a tract of land bounded on the west by the center line of N. C. Highway No. 133 (as it existed prior to the acts of defendant complained of in this action), bounded on the east and south by Elizabeth River, and bounded on the north by the Intra-Coastal Waterway. In its answer, defendant denied plaintiffs' allegation of ownership. However, for the purposes of the hearing upon plaintiffs' motion, and for no other purpose, the parties stipulated that plaintiffs own the area alleged.

The pleadings, affidavits, exhibits, and other evidence presented at the hearing on plaintiffs' motion, show the following: On 29 March 1973 defendant Board of Transportation entered into a contract for construction of Project 8.1313502 in Brunswick County. This Project consisted of construction of a new bridge and approaches to carry N. C. Highway 133 over the Elizabeth River and the Intra-Coastal Waterway. The new bridge and approaches are approximately parallel to the old bridge and roadway but are at a location which is slightly west

of and on the opposite side of the old highway from plaintiffs' land. The project is a controlled access project, and plaintiffs will have no access upon the relocated highway to or from their land. As a condition for issuing a permit for construction of the new bridge over the Inland Waterway, the United States Coast Guard required that such part of the old roadway as is not utilized for the new bridge and its approaches be removed down to the elevation of the adjacent wet lands.

At the time of the hearing on plaintiffs' motion, the new bridge and approaches had been completed, but the old roadway had not yet been excavated and removed. Plaintiffs alleged that the old roadway affords them the only means of vehicular ingress and egress to and from their property and that if defendant is permitted to excavate and remove the old roadway, plaintiffs will suffer irreparable harm for which they have no adequate remedy at law.

The Court, concluding that plaintiffs have an adequate remedy at law in damages under G.S. 136-111 and that they had not shown probable cause that they could establish a right to a permanent injunction, denied plaintiffs' motion for temporary restraining order. Plaintiffs appealed.

Frink, Foy & Gainey by A. H. Gainey, Jr., and Narley Cashwell for plaintiff appellants.

Attorney General Edmisten by Associate Attorney Henry H. Burgwyn for defendant appellee.

PARKER, Judge.

Plaintiffs contend the trial court's denial of their motion for a temporary restraining order was error. They argue that the excavation and removal of the old roadway of N. C. Highway No. 133 would constitute a taking of their property which would not be for a public purpose and that injunctive relief is proper to keep a government agency from abusing its powers. We do not agree.

[1] The owner of land which abuts a highway is recognized to have a special right of easement in the highway for access purposes, and this is a property right which cannot be taken from him without just compensation. *Abdalla v. Highway Commission,* 261 N.C. 114, 134 S.E. 2d 81 (1964). Of course, any taking must be for a public purpose or use and must conform

with the constitutional requirements of due process, but just what is a "public purpose" justifying the exercise of the power of eminent domain must rest on the individual facts of each case. *Highway Commission v. Thornton,* 271 N.C. 227, 156 S.E. 2d 248 (1967).

[2] The statutory authority for the Board's action in this case is provided in G.S. 136-54 which reads as follows:

> "Subject to the provisions of G.S. 136-60 (not applicable as repealed in 1973) the Board of Transportation shall be authorized, when in its judgment the public good requires it, to change, alter, add to, or abandon and substitute new sections for, any portion of the State highway system, as now or hereafter, taken over, maintained and established: Provided, no road shall be changed, altered, or abandoned so as to disconnect county seats and principal towns."

Exercise of the Board's discretionary authority so conferred upon it by statute is not subject to judicial review, unless its action is so clearly unreasonable as to amount to oppressive and manifest abuse. *Highway Commission v. Board of Education,* 265 N.C. 35, 143 S.E. 2d 87 (1965). Nothing in the record now before us indicates an oppressive and manifest abuse of the Board of Transportation's discretionary authority.

[3] Where there is a complete, full, and adequate remedy at law, the equitable remedy of injunction will not lie. The plaintiffs may resort to their legal remedy at law under G.S. 136-111 to recover just compensation for any taking of their property. *See Frink v. Board of Transportation,* 27 N.C. App. 207, 218 S.E. 2d 713 (1975).

The order appealed from is

Affirmed.

Chief Judge BROCK and Judge ARNOLD concur.

DEBRA K. WRIGHT v. WILSON MEMORIAL HOSPITAL, INC.

No. 7610SC84

(Filed 7 July 1976)

Master and Servant § 49— workmen's compensation — laboratory assistant trainee — apprentice employee of hospital

A laboratory assistant trainee receiving on-the-job training at a hospital under an agreement between the hospital and a technical institute at which the trainee was a student was an apprenticeship employee within the meaning of the Workmen's Compensation Act; therefore, her sole remedy to recover for injuries received while engaged in such training lies within provisions of the Workmen's Compensation Act, and summary judgment was properly entered for the hospital in a civil action brought by the trainee to recover for those injuries. G.S. 97-2(2).

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 3 December 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 11 May 1976.

In her verified complaint plaintiff, then a student at Holding Technical Institute (now Wake Technical Institute), alleged that ". . . while engaged in . . . on the job training" at defendant's hospital as a lab technician and while ". . . using a piece of equipment which dispenses a highly critical and highly caustic acid used in blood evaluations . . . the acid container . . . burst and sprayed the highly caustic acid solution into plaintiff's face causing serious and very painful . . ." injuries. Plaintiff alleged that the injuries resulted from defendant's negligence and prayed, inter alia, for $115,000 in damages.

Defendant's answer denied plaintiff's material allegations and averred that plaintiff's sole remedy, if any, arose under the State's Workmen's Compensation Act.

Subsequent to the filing of its answer, defendant moved for summary judgment. According to its supporting documentation, plaintiff, training as a laboratory assistant, worked for defendant under a broad contract executed between the Institute and defendant hospital. Pursuant to curriculum requirements, plaintiff worked at defendant hospital for 40 hours per week but received no salary from defendant. Defendant, however, provided plaintiff with free laundry service for her uniforms and further provided plaintiff with free room and board. Though defendant ". . . had no control over the selection of the

. . . [participants,] the defendant could control the number of students to be enrolled . . . [and required that] each student . . . abide by the rules and regulations of Wilson Memorial Hospital, Inc., and [retained the right to discharge participants] in the event of a violation of the rules and regulations. . . ." In addition to offering participants access to laboratory facilities, the defendant provided the requisite on-the-job training and then allowed participating trainees to conduct ". . . their tests, analyses, and procedures as the agent of the defendant in the same manner as would a full-time laboratory staff member."

Plaintiff submitted no materials in opposition to defendant's motion and stood on her verified complaint.

From the order granting defendant's motion for summary judgment, plaintiff appealed.

Other facts necessary for decision are set out below.

Brenton D. Adams for plaintiff appellant.

Smith, Anderson, Blount & Mitchell, by James D. Blount, Jr., and James G. Billings, for defendant appellee.

CLARK, Judge.

Plaintiff, contending that the trial court erred in granting defendant's motion for summary judgment, maintains that the evidence does not indicate that plaintiff is an "employee" under the Workmen's Compensation Act as a matter of law.

Under G.S. 97-2(2), an "employee" for purposes of Workmen's Compensation includes ". . . every person engaged in an employment under any . . . *apprenticeship*, express or implied, oral or written. . . ." (Emphasis supplied.)

A critical reading of this record indicates as a matter of law that the participants in this laboratory assistantship program, including this plaintiff, are acting as "apprentices" undergoing on-the-job training and hence should be considered employees subject to the provisions of Workmen's Compensation. Thus, plaintiff's rights and remedies, if any, lie solely within the provisions of the Act, and she has no civil remedy available to her. G.S. 97-10.1.

In an analogous case, the Appellate Division of the New York Supreme Court held in *Galligan v. St. Vincent's Hospital*

of City of N. Y., 28 App. Div. 2d 592, 279 N.Y.S. 2d 886 (1967), that a student nurse, injured on the job in defendant's hospital, was an apprentice for purposes of New York's Workmen's Compensation Act. In *Galligan*, the plaintiff nurse basically received room and board, and laundry privileges; the New York Court held that this plaintiff had been ". . . rendering a service to the hospital for its pecuniary gain at the time of the accident, under circumstances that made her status similar to that of an apprentice. An apprentice renders services to a master in a trade for the purpose of learning the trade, receiving no remuneration outside of his board and lodging, although the master receives payment for the services rendered by the apprentice." 279 N.Y.S. 2d, at 889.

The job status of apprentice medical-related personnel is highly problematic and usually must be determined not only on a case-by-case basis but also with special regard to relevant statutory provisions. Though possibly and seemingly incongruous, a lab technician trainee could be considered a student for some purposes and an employee for others. In this regard, we are aware of the recent National Labor Relations Board decision in Cedars-Sinai Medical Center and Cedars-Sinai Housestaff Association, 223 N.L.R.B. No. 57 (March 19, 1976), wherein the Board in a four to one decision held that interns, residents and clinical fellows were "primarily students" and consequently not employees subject to the Labor Act's collective bargaining provisions. We must consider this decision in the light of the unique history and purpose of the National Labor Relations Act in treating the collective bargaining process and in the light of the educational programs for interns, residents and clinical fellows in hospitals affiliated with medical schools, which programs are fully accredited by the Council on Medical Education of the American Medical Association and by the various specialty boards. *Sub judice*, we are concerned with coverage under the Workmen's Compensation Act of trainees who learn primarily from work in a hospital affiliated with a technical school the practical and technical skills required for employment in their training specialty. We find these trainees not to be primarily students, but rather to be apprenticeship employees within the meaning of the Workmen's Compensation Act.

Though not considered in deciding this case, it appears from the record on appeal that plaintiff was covered under the

Workmen's Compensation insurance policy issued to the defendant. The agreement between Holding Technical Institute and defendant hospital contained no provision requiring either party to effect workmen's compensation insurance; nor did it contain any indemnification provision to secure defendant against any loss or damage resulting from trainee injury.

The trial court's entry of summary judgment for defendant is

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

THOMAS ALTON PULLEY, EMPLOYEE-PLAINTIFF v. MIGRANT & SEASONAL FARMWORKERS ASSOCIATION, EMPLOYER-DEFENDANT, AND THE HOME INDEMNITY COMPANY, CARRIER-DEFENDANT

No. 7610IC154

(Filed 7 July 1976)

1. **Master and Servant § 65— workmen's compensation — lifting refrigerator — ruptured disc — no compensable injury**

Evidence was insufficient to support the Industrial Commission's finding that, "As plaintiff was picking up his side of the refrigerator, it slipped and he got a catch in his back," since the evidence showed that plaintiff first had a catch in his back and then the refrigerator slipped; therefore, the Commission erred in concluding that plaintiff sustained an injury by accident.

2. **Master and Servant § 55— workmen's compensation — accident defined**

The term "accident" as used in the Workmen's Compensation Act has been defined as (1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause.

3. **Master and Servant § 65— hernia and back injuries — more than usual duties performed in usual manner required**

To obtain an award of compensation in hernia and ruptured or slipped disc cases, the injury to be classed as arising by accident must involve more than merely carrying on the usual and customary duties in the usual way.

APPEAL by defendants from order of North Carolina Industrial Commission entered 28 November 1975. Heard in the Court of Appeals 26 May 1976.

Plaintiff has been employed by defendant Association since 30 July 1974 as a job counselor and relocator. Plaintiff found jobs in the Raleigh area for those people completing a training course at Rich Square and then helped them physically move their household goods and other possessions from their homes to homes near their job sites in the Raleigh area.

On 28 January 1975, plaintiff, using a two-and-a-half-ton truck of defendant Association, helped one Linwood Sexton move his stove, refrigerator and bedroom suite to a house near his job in Wake Forest. Plaintiff backed the truck up to the rear door and porch; they slid the refrigerator, weighing 450 to 500 pounds to the rear of the truck bed, about one and one-half or two feet above the porch. Plaintiff had one foot on the truck bed and the other foot on the porch as he stooped and picked up the refrigerator when "a catch caught me in the back and the refrigerator slid down onto the porch."

Plaintiff worked the rest of the day but did no lifting. He reported what happened to his employer, went that night to see a physician who put him to bed for a week, and then committed him to a hospital for surgery, which was performed on 17 February 1975 to correct an acute intervertebral disc rupture. Plaintiff now has a 10% permanent disability of the back.

Plaintiff testified in his work he moved similar refrigerators about twice a month, and that he knew of nothing unusual in the performance of his work on this occasion.

Commissioner Stephenson found facts, substantially as recited above, concluded that plaintiff did not sustain an injury by accident, and denied plaintiff's claim. Plaintiff appeared at the hearing without counsel.

On appeal, the Full Commission amended Finding of Fact No. 5 of Commissioner Stephenson by the additional finding that "As the plaintiff was picking up his side of the refrigerator, it slipped and he got a catch in his back . . ." concluded that plaintiff sustained an injury by accident, and ordered payment of compensation, medical expenses and attorney fees. Defendants appealed.

Thomas S. Erwin for plaintiff appellee.

Hedrick, Parham, Helms, Kellam & Feerick by Edward L. Eatman, Jr., for defendant appellants.

CLARK, Judge.

[1] The added finding of fact by the Full Commission that "As the plaintiff was picking up his side of the refrigerator, it slipped and he got a catch in his back . . ." is not supported by the evidence. Plaintiff testified:

"Q. Well, when you felt this catch, did you let go of your side?

A. The refrigerator slipped down, yes, sir."

Linwood Sexton testified, as summarized in the record on appeal, that he was on one side and plaintiff on the other side of the refrigerator with one leg on the floor and one foot on the porch, and the refrigerator dropped and all the weight went on him (Sexton).

Clearly, the testimony of the plaintiff establishes that he first had "a catch in his back" and then the refrigerator slid to the porch. Sexton's testimony does not conflict with that of the plaintiff. We, therefore, cannot accept this finding of fact, and we must now determine if the other findings of fact by the Industrial Commission which were supported by competent evidence do or do not sustain the legal conclusion and the award of the Industrial Commission. *Byers v. Highway Comm.*, 275 N.C. 229, 166 S.E. 2d 649 (1969).

[2] The term "accident" as used in the Workmen's Compensation Act has been defined as (1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause. *O'Mary v. Clearing Corp.*, 261 N.C. 508, 135 S.E. 2d 193 (1964).

[3] To obtain an award of compensation in hernia and ruptured or slipped disc cases, the injury to be classed as arising by accident must involve more than merely carrying on the usual and customary duties in the usual way. *Lawrence v. Mill*, 265 N.C. 329, 144 S.E. 2d 3 (1965); *Byrd v. Cooperative*, 260 N.C. 215, 132 S.E. 2d 348 (1963); *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 124 S.E. 2d 109 (1962); *Dunton v. Construction Co.*, 19 N.C. App. 51, 198 S.E. 2d 8 (1973); *Russell v. Yarns, Inc.*, 18 N.C. App. 249, 196 S.E. 2d 571 (1973).

Awards of compensation in hernia and ruptured or slipped disc cases have been upheld where the employee was injured while lifting objects when in an unusually twisted, cramped

or awkward position. *Keller v. Wiring Co.*, 259 N.C. 222, 130 S.E. 2d 342 (1963); *Searcy v. Branson*, 253 N.C. 64, 116 S.E. 2d 175 (1960); *Edwards v. Publishing Co.*, 227 N.C. 184, 41 S.E. 2d 592 (1947).

[1] The finding by the Full Commission that the refrigerator first slipped and then plaintiff had a catch in his back, which we must reject as unsupported by the evidence, was undoubtedly considered significant, if not controlling, by the Commission in overruling the Hearing Commissioner and concluding that plaintiff sustained an injury by accident. Without this finding the facts found do not establish that plaintiff at the time of injury was performing any unusual task or that he was in a twisted, cramped or awkward position. He was performing his usual work of moving a refrigerator, of average or usual weight, from a truck into a house.

We find that the facts found by the Full Commission which are supported by competent evidence do not sustain the conclusion that plaintiff sustained an injury by accident. The award of the Industrial Commission is

Reversed and remanded.

Judges VAUGHN and MARTIN concur.

POWELL MANUFACTURING COMPANY, INC. v. HARRINGTON MANUFACTURING COMPANY, INC.

HARRINGTON MANUFACTURING COMPANY, INC. v. POWELL MANUFACTURING COMPANY, INC.

No. 766SC100

(Filed 7 July 1976)

Pleadings § 11; Rules of Civil Procedure § 13— compulsory counterclaim

Plaintiff's Mecklenburg County action based on purported false advertising by defendant of defendant's mechanical tobacco harvester was a compulsory counterclaim which should have been asserted by plaintiff in defendant's prior action in Bertie County based on purported false advertising by plaintiff of plaintiffs' mechanical tobacco harvester, and defendant's motion to dismiss plaintiff's Mecklenburg County action should have been allowed.

APPEAL by plaintiff Powell Manufacturing Company, Inc., (hereinafter "Powell") from *Hasty, Judge.* Order entered 5 December 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 May 1976.

On 12 September 1974, the first of two lawsuits was begun when Harrington Manufacturing Company, Inc., (hereinafter "Harrington") brought action number 74CVS459 in Bertie County alleging that defendant Powell falsely and fraudulently advertised that Powell manufactured the "exclusive CutterBar," purportedly a unique device on a tobacco harvesting machine. Harrington maintained that Powell's "CutterBar" was remarkably similar to Harrington's splinter-knife defoliator, and it argued that this course of advertising fostered unfair trade competition, engendered a monopolistic business climate, prejudiced and deceived the public, disparaged Harrington's business circumstance and constituted a deceptive act under G.S. 75-1.1 et seq. Harrington sought, inter alia, certain monetary relief.

Powell's answer essentially denied the substantive allegations raised in the Bertie County complaint.

On 4 November 1974, several months after Harrington's action was filed in Bertie County, Powell filed an action against Harrington in the Superior Court of Mecklenburg County. Powell alleged that Harrington's "Roanoke Hydro-synchronized Blade Assembly," being advertised by Harrington as a "dramatic breakthrough in harvesting tobacco" is essentially the same machine as the one manufactured by Powell with the "CutterBar." Powell asserted similar allegations regarding Harrington's advertising of curing racks and barns, and alleged that Harrington's purported misrepresentations were maliciously, unethically, and wilfully disseminated to the public, and were unfair and deceptive methods of competition under G.S. 75-1.1.

Harrington moved to dismiss Powell's complaint in action 74CVS19797 on grounds that Powell's allegations should have been raised as compulsory counterclaims in Harrington's Bertie County action 74CVS459. Harrington attacked the Mecklenburg County action on the basis of Rules 12(b)(1) and 13(a) of the North Carolina Rules of Civil Procedure.

In its order, filed 5 December 1975, the Mecklenburg County trial court, first found that both "parties allege in their

respective actions identified hereinabove that they manufactured a tobacco harvesting combine sold throughout the tobacco growing areas of the southeast, and that the adverse party has falsely advertised and represented its respective machine." It then concluded, inter alia, that the " . . . claim set forth by Powell Manufacturing Company, Inc. in this action constitutes a compulsory Counterclaim in that action entitled *Harrington Manufacturing Company v. Powell Manufacturing Company*, File No. 74-CVS-459, filed in Bertie County on September 12, 1974, and is required to be stated in said action in Bertie County." The court ordered consolidation of the Mecklenburg action with the Bertie County lawsuit. Powell, plaintiff herein, appeals.

Other facts necessary for decision are set out in the opinion.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Gaston H. Gage and William P. Farthing, Jr., for plaintiff appellant.

Pritchett, Cooke & Burch, by Stephen R. Burch and William W. Pritchett, Jr., for defendant appellee.

ARNOLD, Judge.

Appellant contends that its Mecklenburg County complaint is not a compulsory counterclaim because it does not arise out of the same transaction or occurrence as that alleged in appellee's Bertie County claim. We disagree.

G.S. 1A-1, Rule 13(a), provides in pertinent part that:

"A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if

(1) At the time the action was commenced the claim was the subject of another pending action, or

(2) The opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judg-

> ment on that claim, and the pleader is not stating any counterclaim under this rule."

Here, a critical reading of the pleadings indicates that all of the allegations relate to and arise out of the same competitive advertising practices regarding technically sophisticated mechanical tobacco harvesters. Both parties have packaged sales programs designed to reach the same markets, and whether unlawful acts were committed in the course of these endeavors is a subject matter which ought to be litigated and resolved in the context of one lawsuit. See: *Hy-way Heat Systems, Inc. v. Jadair, Inc.*, 311 F. Supp. 454 (E.D. Wis. 1970); *United Fruit Co. v. Standard Fruit and Steamship Co.*, 282 F. Supp. 338 (Mass. 1968). As the Federal District Court, analyzing the similarly drawn Federal rule, stated at page 456 in the apparently analogous case of Hy-way Heat Systems, " . . . [b]oth claims deal with misrepresentation of the defendants' products, although from divergent standpoints . . . [and] [b]oth parties are competing for the same customers . . . [while allegedly] using basically the same unfair methods."

Appellant's action in Mecklenburg County involves purported false advertising concerning mechanical tobacco harvesters. The relationship of its claim to appellee's action in Bertie County, also involving purported false advertising of mechanical tobacco harvesters, is so logical that it must be asserted as a counterclaim in the Bertie action. A compulsory counterclaim is not limited to facts alleged in the original complaint, but includes logically related acts and conduct involving the parties. *United Fruit Co., supra,* at 339.

We have considered appellant's remaining contentions and find them to be without merit.

Appellant's action must be asserted as a compulsory counterclaim in defendant's action filed in Bertie County [74CVS459]. Therefore, defendant's motion to dismiss on grounds that the action constituted a compulsory counterclaim should have been allowed. The matter is remanded to Superior Court of Mecklenburg County for entry of an order of dismissal in accordance with this opinion.

Remanded.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. JOYCE MARIE WATLINGTON

No. 7621SC200

(Filed 7 July 1976)

1. **Criminal Law § 84— leading questions asked by court — no error**

The trial court did not err in asking leading questions of a police officer for the purpose of clarifying his testimony during a hearing on a motion to suppress evidence.

2. **Searches and Seizures § 4— search of vehicle under warrant — subsequent search of passenger not named in warrant**

Evidence was sufficient to support the trial court's finding that a search pursuant to a warrant of a vehicle and its driver was completed before the search of defendant passenger who was not named in the warrant was made. G.S. 15A-256.

3. **Searches and Seizures § 4— warrant to search vehicle or premises — search of persons not named in warrant — constitutionality of statute**

Where police officers have a warrant authorizing the search of a vehicle or premises, it is reasonable to permit a search of persons found in the vehicle or on the premises, within the restrictions of G.S. 15A-256, to prevent those persons from concealing the contraband subject matter described in the search warrant, and such limited searches do not violate the Fourth Amendment of the U. S. Constitution.

APPEAL by defendant from *Seay, Judge.* Judgment entered 20 November 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 9 June 1976.

Defendant was charged with possession of heroin. Prior to her trial she moved to suppress evidence consisting of four tinfoil packets containing heroin which she alleges were taken from her by an illegal search.

At the hearing on the motion the State's evidence tended to show that the Winston-Salem police obtained a warrant which authorized the search of a 1966 brown Chevrolet owned by Ganzy Pickens, and a residence at 602 Mock Street. The search warrant was based upon an affidavit indicating that heroin would be found in or on the property described.

Defendant was a passenger in the 1966 Chevrolet being operated by Ganzy Pickens when the police stopped the car and searched Pickens immediately. No heroin was found on Pickens. Pickens, defendant and the 1966 Chevrolet then were taken to the Forsyth County jail where the car was searched. After the

car was searched a policewoman escorted defendant to a private rest room and searched her. No heroin was discovered in the Chevrolet automobile, but four tinfoil packets of heroin were found in defendants' pocket.

Defendant's evidence tended to show that the police officers had not completed the search of the car prior to the policewoman's searching defendant (in violation of G.S. 15A-256).

The court concluded that the search of the car was completed before defendant was searched, and that the heroin obtained pursuant to the search of defendant was admissible. Defendant pled guilty to possession of heroin and a prison sentence was imposed. She appealed to this Court pursuant to G.S. 15A-979(b).

Attorney General Edmisten, by Associate Attorney Norma S. Harrell, for the State.

A. Carl Penny for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends that the trial judge committed prejudicial error by asking leading and biased questions to the police officers who testified at the hearing on the motion to suppress evidence. She argues that the trial judge framed his questions in the language of G.S. 15A-256, and that the witnesses were enticed to testify in a manner which established the legality of the search of defendant.

During the testimony of the officer who had conducted the search of Pickens' car the trial judge asked, "You're testifying that the search of the vehicle described in the warrant was completed and that thereafter the defendant was searched?" The officer answered, "Yes sir."

We find no prejudicial error in the trial judge's questioning the police officer. There is sufficient testimony in the record, in addition to the officer's response to His Honor's question, to establish that defendant was not searched until after the search of the automobile was completed. Moreover, it is permissible for the trial judge to direct questions to a witness for the purpose of clarifying his testimony. *State v. Freeman,* 280 N.C. 622, 187 S.E. 2d 59 (1972). Defendant admits that the witness's testimony was not clear, and the trial judge did not

err in directing questions to clarify the officer's testimony. Stansbury's N. C. Evidence, Brandis Revision, § 31, Leading Questions.

[2] There is no merit to defendant's contention that there was no competent evidence to support the judge's finding that the search of Pickens and the car was completed before defendant was searched. Pickens stated that "[t]hey searched me immediately upon getting out of the car." Officer Burton testified that "[t]he car search was completed about the same time Officer Iberham arrived to search Miss Watlington." Findings of fact by the trial court, if supported by competent evidence, are conclusive even when there is contradictory evidence. *State v. Carey,* 285 N.C. 509, 206 S.E. 2d 222 (1974). There is ample evidence to support the trial court's findings.

[3] We also see no merit in defendant's argument that G.S. 15A-256 violates the Fourth Amendment, and is unconstitutional because it permits the search of persons who merely happen to be present in a vehicle or on premises which are the subject of the search warrant. The statute reads as follows:

> "An officer executing a warrant directing a search of premises not generally open to the public or of a vehicle other than a common carrier may detain any person present for such time as is reasonably necessary to execute the warrant. If the search of such premises or vehicle and of any persons designated as objects of the search in the warrant fails to produce the items named in the warrant, the officer may then search any person present at the time of the officer's entry to the extent reasonably necessary to find property particularly described in the warrant which may be concealed upon the person, but no property of a different type from that particularly described in the warrant may be seized or may be the basis for prosecution of any person so searched. For the purpose of this section, all controlled substances are the same type of property."

Only those searches and seizures that are unreasonable are prohibited by the Fourth Amendment. Where police officers have a warrant authorizing the search of a vehicle or premises it is reasonable to permit a search of persons found in the vehicle or on the premises, within the restrictions of G.S. 15A-256, to prevent those persons from concealing the contraband subject matter described in the search warrant.

"Where, as in this case, probable cause to believe that a drug is kept or concealed on certain described premises is established to the satisfaction of a proper magistrate, the search of a person found on the premises in the execution of a search warrant is not only reasonable, but necessary to secure effective enforcement of the . . . Drug Act." *State v. Loudermilk*, 208 Kan. 893, 494 P. 2d 1174, 1178 (1972). The limited searches authorized by G.S. 15A-256 do not violate the Fourth Amendment of the United States Constitution, and the search of defendant in the instant case was entirely reasonable.

We have reviewed defendant's remaining assignments of error and find them also to be without merit. The trial court's order denying the motion to suppress evidence is

Affirmed.

Judges PARKER and HEDRICK concur.

FRED L. POORE AND WIFE, EDNA S. POORE v. NORFOLK-SOUTHERN RAILWAY

No. 762SC167

(Filed 7 July 1976)

Limitation of Actions § 18— statute of limitations — failure of proof

The trial court properly directed a verdict for defendant railway in plaintiffs' action for breach of right-of-way agreements where defendant pleaded the statute of limitations and plaintiffs failed to offer evidence at trial that would repel the bar of either the five-year or three-year periods prescribed in G.S. 1-51 and G.S. 1-52.

APPEAL by plaintiffs from *Walker, Judge*. Judgment entered 8 October 1975 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 24 May 1976.

On 27 January 1972 plaintiffs instituted this action and alleged that defendant breached two contracts entered into with plaintiffs on 27 July 1965. The contracts provided for the purchase by defendant of a right-of-way across plaintiffs' lands. The contract authorized the removal of earth from a certain portion of plaintiffs' land in order to fill in areas of swamp land over which the railroad was to be constructed. Defendant

was obligated under the contracts to "install a grade crossing [and] . . . a cattle underpass to be constructed out of 10 gauge corrugated metal pipe 72 inches in diameter," and to "leave the . . . premises reasonably level or with a reasonably uniform slope."

Plaintiffs alleged that the underground access route for livestock was filled with dirt within several weeks after its installation, and that the private crossing was also unsuitable within three weeks after installation. Plaintiffs further alleged that defendant removed earth from areas not specified in the contract, and failed to level the land and provide adequate drainage after digging out large quantities of earth from the plaintiffs' lands. Plaintiffs prayed for damages in the amounts of $2,500 for lost livestock, $15,000 as reasonable compensation for loss of use of the land severed by the railroad, $25,000 punitive damages, and the difference in the fair market value of the lands adjacent to defendant's right-of-way before and after the installation of the right-of-way. Also, plaintiffs sought an order requiring the defendant to regrade and adequately drain the land.

Defendant answered asserting that it had performed all acts required under the contract in a reasonably prudent and workmanlike manner. It alleged that plaintiffs were negligent "in failing to construct and maintain proper fences; in failing to seed and fertilize the sloping land so as to impede erosion; [and] in placing animals in an area which plaintiffs knew, or in the exercise of due care should have known, to be hazardous to said animals," and that plaintiffs failed to take measures to minimize their damages. Defendant also pleaded the statute of limitations as a bar to plaintiffs' recovery and counterclaimed for $8,000 as damages to its right-of-way.

Plaintiffs filed an amended complaint and alleged that defendant promised to perform further work under the contract, and that it was not until 31 December 1969 that the defendant took the position that it had no further obligations under the contract.

Defendant moved for summary judgment which was denied.

The parties stipulated in the pretrial order that the defendant "completed its work in the 'bar-pit' area" [described in the contract in Book 587, page 50], installed a grade crossing, and installed metal pipe to be used as the cattle crossing.

Plaintiffs' evidence at trial tended to establish that, prior to the construction of the railroad, plaintiffs' lands were used for pasture and grazing cattle. Plaintiffs presented testimony that defendant removed quantities of earth from the land reducing the level of the land from 33.7 feet above sea level to 21.9 feet above sea level, and that the defendant made no effort to level the land after removing the dirt. Plaintiffs introduced further evidence that the grade crossing and cattle crossing were unfit for use within a very short period after construction.

At the close of plaintiffs' evidence defendant moved for a directed verdict on the grounds that plaintiffs' evidence failed to establish a breach of contract by the defendant, and failed to repel the bar of the statute of limitations. The motion was granted and plaintiffs appealed to this Court.

Wilkinson and Vosburgh, by John A. Wilkinson, for plaintiff appellants.

Rodman, Rodman and Holscher, by Edward N. Rodman, for defendant appellee.

ARNOLD, Judge.

Defendant sufficiently alleged the statute of limitations as a bar to plaintiffs' cause of action. The directed verdict for defendant was based, in part, on the grounds "that the plaintiffs' evidence, taken in the light most favorable to them, fails to repel the bar of the Statutes of Limitation, G.S. 1-52 and/or G.S. 1-51, pleaded by the defendant in its answer, ... "

When defendant pleaded the statute of limitations the burden was placed on plaintiffs to show that the action was instituted within the prescribed period. *Jewel v. Price,* 264 N.C. 459, 142 S.E. 2d 1 (1965). Although plaintiffs' amended complaint contained allegations which, if true, might have been sufficient to overcome the bar of the statute of limitations, they failed to offer any evidence at trial that would repel the bar of either the five-year or three-year periods prescribed in G.S. 1-51 and G.S. 1-52.

Since the plaintiffs failed to put on evidence to meet their burden of showing that the action was brought within the prescribed periods the defendant's motion for directed verdict was properly entered. *Little v. Rose,* 285 N.C. 724, 208 S.E. 2d 666 (1974); *Fulp v. Fulp,* 264 N.C. 20, 140 S.E. 2d 708 (1965);

and *Jennings v. Morehead City*, 226 N.C. 606, 39 S.E. 2d 610 (1946).

It would be superfluous to consider the remaining assignments of error. Judgment is

Affirmed.

Judges PARKER and HEDRICK concur.

W. T. BOONE, ADMINISTRATOR OF NANCY WHITE FULLER, PLAINTIFF v. DAVE FOSTER FULLER, DEFENDANT

No. 769SC166

(Filed 7 July 1976)

Death § 1— wrongful death — cause of death — guilty plea to murder — summary judgment

In an action to recover damages for the death of plaintiff's intestate allegedly resulting from an assault on her by defendant, the trial court properly ruled that there was no genuine issue of fact as to the cause of decedent's death and properly entered partial summary judgment for plaintiff on that issue where plaintiff offered defendant's plea of guilty to second degree murder of decedent, and defendant's affidavit in opposition stated only that the guilty plea was the result of "plea bargaining" and that he was "informed" and "believed" that decedent died of pneumonia, since defendant offered no competent evidence to contradict plaintiff's evidence as to the cause of death.

APPEAL by defendant from *Godwin, Judge*. Judgment entered 18 September 1975 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 27 May 1976.

This is a civil action wherein the plaintiff, W. T. Boone, Administrator of the Estate of Nancy White Fuller, is seeking $150,000.00 damages from the defendant, Dave Foster Fuller, allegedly resulting from an assault by defendant causing serious injury and eventual death to plaintiff's intestate.

In his complaint, filed 23 June 1972, plaintiff alleged that on 17 December 1971 "the defendant, without just cause, unlawfully, willfully and maliciously committed an assault upon the plaintiff's intestate" by beating and kicking her. As a result of the assault, she suffered serious painful injuries from which

she died on 30 January 1972. Defendant answered denying the allegations of the complaint and prayed for a jury trial on all the triable issues.

On 24 July 1975 plaintiff filed a motion for summary judgment on the issue of "whether . . . the plaintiff's intestate died as a result of the injuries inflicted upon the plaintiff's intestate by the defendant." In support of his motion, plaintiff offered certified copies of portions of the record of the case of *"State of North Carolina v. Dave Foster Fuller,* number 72 CR 348," which showed that defendant had pleaded guilty in that case to the second degree murder of Nancy Fuller. Defendant filed his own affidavit to show that the guilty plea had been the result of "plea bargaining" which he agreed to in order to be assured of a minimum sentence rather than risk conviction and a longer sentence by pleading not guilty. Also in his affidavit was the following statement:

> "That this defendant is informed and believes that the ultimate death cause of plaintiff's intestate was pneumonia which occurred more than six weeks after the alleged assault by the defendant upon the plaintiff and that the defendant has a meritorious defense in this civil action against him."

On 18 September 1975, following a hearing on the matter, the court allowed plaintiff's motion for partial summary judgment, ruling that there was no genuine issue of material fact as to the cause of death of Nancy Fuller. Defendant appealed.

Davis, Sturges and Tomlinson by Charles M. Davis for plaintiff appellee.

Yarborough, Jolly and Williamson by E. F. Yarborough for defendant appellant.

HEDRICK, Judge.

The record on appeal in this case was filed more than 150 days from the giving of notice of appeal in the court below and is subject to dismissal. App. R. 12(a). We have elected, however, to treat the appeal as a petition for writ of certiorari and have allowed the same.

The principal question presented by defendant for review is whether the trial court erred in ruling that there was no

genuine issue as to the cause of death of decedent. He contends that the trial court erroneously treated his plea of guilty as a judicial admission establishing as a matter of law the fact that decedent died as a result of the assault upon her by defendant. We agree with defendant that his plea was not a judicial admission *(see* Stansbury, North Carolina Evidence 2d, § 166), but we believe that defendant has misconceived the reasoning for the entry of summary judgment below.

It is well settled in North Carolina that, upon a motion for summary judgment, the moving party has the burden of offering evidence to show that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law. *Singleton v. Stewart,* 280 N.C. 460, 186 S.E. 2d 400 (1972); *Kessing v. Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823 (1971).

The plea of guilty made by the defendant was an evidentiary admission by him that he did kill the decedent. *See Grant v. Shadrick,* 260 N.C. 674, 133 S.E. 2d 457 (1963). Such evidence supported plaintiff's motion. Once plaintiff offered the plea into evidence, the defendant was not entitled to rest on his pleading but had the burden to come forward with evidence in contradiction to plaintiff's evidence to show that a genuine issue of fact did exist. *Coakley v. Motor Co.,* 11 N.C. App. 636, 182 S.E. 2d 260 (1971), *cert. denied* 279 N.C. 393, 183 S.E. 2d 244 (1971); *Patterson v. Reid,* 10 N.C. App. 22, 178 S.E. 2d 1 (1970); G.S. 1A-1, Rule 56(e). This the defendant did not do. That the plea was the result of "plea bargaining" had no bearing on the truth of the plea entered. It was still an admission sworn to by defendant that he did in fact kill the decedent. Defendants' other allegation to his affidavit that he "believed" decedent died of pneumonia did not satisfy the requirement under G.S. 1A-1, Rule 56(e), that an affidavit "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein," and could not have been considered by the court. *Singleton v. Stewart, supra.*

In short, the defendant offered no competent evidence to contradict plaintiff's evidence as to the cause of death. Plaintiff's evidence was sufficient to show that no genuine issue of fact

as to the cause of death existed. Summary judgment for plaintiff on the issue as to the cause of death is affirmed.

Affirmed.

Judges PARKER and ARNOLD concur.

J. H. BURWELL, JR., ADMINISTRATOR OF THE ESTATE OF JAMES M. WILKERSON, DECEASED v. WILLIAM A. WILKERSON, SINGLE; OSSIE W. MILLER AND HUSBAND, FREDDIE MILLER; ARTHUR WILKERSON AND WIFE, JANE WILKERSON; DOVIE W. WILKINS AND HUSBAND, J. D. WILKINS; SAMUEL H. WILKERSON AND WIFE, MARGIE WILKERSON; HELEN L. WILKERSON, WIDOW; FRED L. WILKERSON, JR., AND WIFE, JEROLINE WILKERSON; LINDA W. THOMAS AND HUSBAND, RONALD THOMAS; OLLIE DAVIS WILKERSON, WIDOW; ESTHER W. NEDD AND HUSBAND, HUBERT C. NEDD; DORIS W. PROVIDENCE, SINGLE; JOHNETTA W. LAMB AND HUSBAND, THOMAS W. LAMB; THOMAS E. WILKERSON, SINGLE; ALICE W. WILSON AND HUSBAND, PAUL WILSON; GLENN E. WILKERSON, SINGLE; JAMES A. WILKERSON, SINGLE; MELVIN T. WILKERSON, SINGLE; LARRY D. WILKERSON, SINGLE; SHEILA Y. WILKERSON, SINGLE; JAMES A. WILKERSON AND WIFE, IDA WILKERSON; PALMIRA W. BRADFORD AND HUSBAND, JACK BRADFORD; KAY WILKERSON, SINGLE; VERLA WILKERSON, WIDOW; KIMBERLY JOYCE WILKERSON, SINGLE; DIEDRA COLLETTE WILKERSON, SINGLE; COREY KING WILKERSON, WIDOW; AND O. M. YORK, TRUSTEE

No. 7629SC126

(Filed 7 July 1976)

Executors and Administrators § 15— sale of land to make assets — motion to set aside confirmation

The trial court did not err in the denial of appellants' motions under Rule 60 to vacate and set aside orders of confirmation of a sale of realty to make assets to pay debts of an estate.

APPEAL by respondents from *Grist, Judge.* Judgment entered 11 September 1975 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 14 May 1976.

This case basically involves the propriety of a sale of a decedent's real property to satisfy certain debts outstanding against the estate of James M. Wilkerson who died in 1962 leaving a will.

The document purporting to be his will was probated in common form on 23 August 1962. In August 1965, a caveat was filed, and the matter was not resolved until issuance of an order and judgment dated 25 April 1974, wherein the court declared that the paper writing was not a valid will, appointed the petitioner-appellee as administrator and taxed the cost of the entire proceeding against the decedent's estate.

Several months after his appointment, the administrator, in a 28 June 1974 petition, alleged that the indebted estate included no assets in the form of personalty, but noted that decedent " . . . died seized and possessed of two adjoining tracts of land . . . " , and prayed that the realty be sold " . . . in order to create assets with which to pay the debts and costs of administration of the estate. . . . "

On 9 May 1975 the Clerk and Superior Court Judge, pursuant to a court-ordered sale of the property, entered orders of confirmation. This confirmation of sale, however, was attacked shortly thereafter by respondents' various Rule 60 motions.

In their 25 July 1975 Rule 60 motions, respondents sought to have the 9 May 1975 confirmation orders set aside and vacated. Taking their allegations, supporting documentation and testimony together, the movants basically maintained that notwithstanding a "family settlement" with respect to the decedent's purported will, the petitioner-appellee, acting then as the caveators' attorney, ignored the family settlement and proceeded to litigate the matters involved in the caveat proceeding to a final disposition and judgment and ultimately to the financial detriment of all the heirs. As a result of this litigation, movants assert that substantial costs and attorney fees were generated, resulting in a potentially serious depletion of an otherwise virtually unencumbered estate. Finally, the movants argued that this petitioner-inspired process of extended costly litigation resulted in the dissipation of the estate.

Petitioner's response to the movants' evidence included introduction of a 13 May 1964 instrument showing that the executors of decedent's will considered the decedent to have been incompetent. One of the executors, however, disavowed his signature on the document.

From the order denying their motions to set aside the confirmation orders, respondents appealed.

Robert W. Wolf for petitioner appellee.

David H. Wagner for respondent appellants.

MARTIN, Judge.

Respondent appellants contend that the trial court erred in denying their motions to set aside and vacate the 9 May 1975 orders of confirmation. We find no merit to this assignment of error.

As Justice Copeland, speaking for our Supreme Court, recently stated in *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E. 2d 532 (1975), " . . . a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the Court abused its discretion." Here, a careful and critical review of the trial court's order denying respondents' Rule 60 motion indicates that the findings of fact and conclusions of law are amply supported by the evidence, and we find no evidence whatsoever indicating the trial court abused its discretion and authority.

We have reviewed respondents' other contentions and find them also to be without merit.

The order below is

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. JIMMY LEE DUNCAN

No. 7627SC190

(Filed 7 July 1976)

1. Indictment and Warrant § 15— motion to quash indictment — statement of grounds and relief sought

The trial court did not err in failing to hear defendant's motion made at trial to quash the indictment where the grounds for the motion were not stated and the relief or order sought was not set forth. G.S. 15A-951.

2. Indictment and Warrant § 14— quashal of indictment — grounds

A bill of indictment may be quashed only for want of jurisdiction, irregularity in the selection of the grand jury, or fatal defect appearing on the face of the indictment.

3. Indictment and Warrant § 14— motion to quash indictment — defects on face of record

A motion to quash a warrant for failure to charge a crime or lack of jurisdiction of the court to try the case will be allowed only when the defects appear on the face of the record.

APPEAL by defendant from *Falls, Judge.* Judgment entered 22 October 1975 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 8 June 1976.

Upon a plea of not guilty defendant was tried on a bill of indictment charging him with the armed robbery of Flaye Willis on 26 June 1975.

Evidence presented by the State tended to show: On the day alleged, defendant and another man entered a store operated by Willis. Defendant pointed a gun at Willis and stated that they wanted "something besides gas." Willis grabbed the gun but was struck, subdued, and chained to a steel post by the robbers. Defendant took Willis' wallet containing $600, and the other robber took the cash drawer and its contents. Although Willis had known defendant for many years, at the time of the robbery he did not know defendant's name. Following the incident, he gave police a description of defendant, selected his picture from a police album and identified defendant in a lineup.

Defendant testified and denied any participation in the robbery. He presented evidence tending to show that he was employed picking beans on the day of the alleged robbery.

A jury found defendant guilty as charged and from judgment imposing prison sentence of thirty years, defendant appealed.

Attorney General Edmisten, by Associate Attorney J. Michael Carpenter, for the State.

Assistant Public Defender Michael Kent Hodnett for defendant appellant.

BRITT, Judge.

By his first assignment of error defendant contends the trial court erred in refusing to hear his motion to quash the indictment. We find no merit in the assignment.

[1] The record on appeal discloses that when the case was called for trial the following transpired: The district attorney

read the bill of indictment and asked how defendant pled. His attorney then asked to see the indictment after which he stated to the court: "For the record, we move to quash and enter a plea of not guilty." The court then stated: "Under the new rules, you're not allowed to move to quash at this time, as I understand them. That's a motion you should have filed long before trial."

Defendant argues that his motion to quash is governed by G.S. 15A-952(d) which provides: "Motions concerning jurisdiction of the court or the failure of the pleading to charge an offense may be made at any time." Subsection (b) of said statute provides that "except as provided in subsection (d)" when certain motions are made in superior court, they must be made within the time limitations stated in subsection (c) unless the court permits a later filing. Subsection (c) states that unless otherwise provided, the motions listed in subsection (b) must be made at or before the time of arraignment if arraignment is held prior to the session of court for which the trial is calendared; if arraignment is to be held at the session for which the trial is calendared, the motions must be filed on or before 5:00 p.m. on Wednesday prior to the session when trial of the case begins.

While G.S. 15A-951 does not require that a motion made during a trial or hearing be in writing, it does require that the grounds for the motion be stated and that it set forth the relief or order sought. In the case *sub judice,* the grounds for the motion were not stated and it did not set forth the relief or order sought. Although the trial judge might have given a partially incorrect reason for his ruling, considering the form in which the motion was made, we hold that he did not err in failing to "hear" the motion.

[2] There are additional reasons for our holding that the trial court did not err in its ruling. A bill of indictment may be quashed only for want of jurisdiction, irregularity in the selection of the grand jury, or fatal defect appearing on the face of the indictment. *State v. Allen,* 279 N.C. 492, 183 S.E. 2d 659 (1971).

A motion to dismiss or quash an indictment because of irregularity in the selection of the grand jury is now governed by G.S. 15A-955, and by virtue of G.S. 15A-952(b)(4) such motion is subject to subsection (c) summarized above.

[3] In *State v. Underwood,* 283 N.C. 154, 195 S.E. 2d 489 (1973), our Supreme Court held that a motion to quash a warrant for failure to charge a crime, or a lack of jurisdiction of the court to try the case, will be allowed only when the defects appear on the face of the record. A careful review of the record in this case fails to disclose that the court lacked jurisdiction or that the indictment did not properly charge the offense for which defendant was tried.

We have considered the other assignment of error brought forward and argued in defendant's brief but conclude that it too is without merit.

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. GORDON ROWE

No. 768SC213

(Filed 7 July 1976)

Jury § 3; Constitutional Law § 29— alternate juror in jury room — mistrial

The trial court erred in failing to order a mistrial where an alternate juror was in the jury room with the jury after they had begun their deliberations, notwithstanding the court advised defense counsel that a mistrial would be granted if defendant moved for a mistrial and defendant declined to make such a motion.

APPEAL by defendant from *Small, Judge.* Judgment entered 20 January 1976 in Superior Court, WAYNE County. Heard in the Court of Appeals 10 June 1976.

By separate indictments proper in form defendant was charged with (1) possession of heroin with intent to sell, (2) sale of heroin, and (3) conspiracy to possess and sell heroin. He pled not guilty to all charges.

At the close of the State's evidence, the court allowed defendant's motion for directed verdict as to the conspiracy charge but denied his motions to dismiss the other charges. Defendant presented no evidence.

The jury found defendant guilty of charges (1) and (2) and from judgment imposing active prison sentence, he appealed.

Attorney General Edmisten, by Assistant Attorney General James E. Magner, Jr., for the State.

J. Faison Thomson, Jr., for defendant appellant.

BRITT, Judge.

Defendant assigns as error the failure of the trial court to order a mistrial for the reason that an alternate juror was present in the jury room with the jury after they began their deliberations. The assignment must be sustained.

The record discloses: The court concluded its charge to the jury at 11:35 a.m., instructed the jury to go to their room to deliberate on their verdict, and took a ten minutes recess. Immediately following the recess, and being informed that it had failed to excuse the thirteenth juror, the court had the jury returned to the courtroom. The court asked the jurors several questions including whether they had "begun discussing or deliberating upon the merits of the case." The foreman replied that they had.

In the recent case of *State v. Bindyke*, 288 N.C. 608, 623-27, 220 S.E. 2d 521, 531-33 (1975), in an opinion by Chief Justice Sharp, our Supreme Court said:

> The rule formulated by the overwhelming majority of the decided cases is that the presence of an alternate, either during the entire period of deliberation preceding the verdict, *or* his presence at any time during the *deliberations* of the twelve regular jurors, is a fundamental irregularity of constitutional proportions which requires a mistrial or vitiates the verdict, if rendered. And this is the result notwithstanding the defendant's counsel consented, or failed to object, to the presence of the alternate. (Numerous citations.)
>
> * * *
>
> After considering the decisions expounding both the majority and minority views we are constrained to adopt the majority rule and hold that the presence of an alternate in the jury room during the jury's deliberations vio-

lates N. C. Const. art. I, § 24 and G.S. 9-18 and constitutes reversible error *per se.*

* * *

. . . We hold that at any time an alternate is in the jury room *during deliberations* he participates by his presence and, whether he says little or nothing, his presence will void the trial.

While the court's inquiry in the case at bar revealed that the alternate juror did not sit at a table with the twelve jurors while they began their discussion and deliberation, the fact remains that the alternate was *present,* thereby voiding the trial. Commendably, the able trial judge, by questioning the jurors, attempted to establish before verdict that defendant had not been prejudiced; nevertheless, the rule laid down in *Bindyke* was clearly violated.

It is true that when the alternate was removed the court advised defense counsel that if he would move for a mistrial, the motion would be granted; and that counsel, after conferring with defendant, informed the court that defendant did not wish to make such motion. Again we quote from the opinion in *Bindyke,* 288 N.C. at 623, 220 S.E. 2d at 530: "An unbroken line of North Carolina cases hold that in felony trials the accused must be tried by a jury of twelve and he cannot consent to a lesser number. The rule is restated and authorities cited in *State v. Hudson,* 280 N.C. 74, 185 S.E. 2d 189 (1971)."

If a defendant in a felony trial cannot consent to a trial by fewer than twelve jurors, we fail to perceive how he can assent to deliberations by more than twelve. In *People v. Bruneman,* 4 Cal. App. 2d 75, 40 P. 2d 891 (1935), one of the cases cited and quoted from in *Bindyke,* the California court held that the constitution of that state guaranteed a defendant the right of trial by jury as the right existed at common law, and one of the essential characteristics of the common law jury is that "twelve persons, not more nor fewer, shall pass upon the issues of fact."

For the reasons stated, the defendant is awarded a

New trial.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. WILLIAM MIKE FREEDLE

No. 7622SC68

(Filed 7 July 1976)

1. **Automobiles § 2— habitual offender statute — validity**

Once the habitual offender provisions of G.S. 20-227 are invoked, the five-year period of that statute prevails over the three-year period of G.S. 20-227 applicable upon a third conviction of driving under the influence; furthermore, the habitual offender statute does not abrogate the discretionary powers vested in the Division of Motor Vehicles by G.S. 20-231.

2. **Automobiles § 2— habitual offender statute — no unconstitutional grant of legislative power**

Provision of G.S. 20-222 that the Commissioner of Motor Vehicles "shall certify" a defendant's driving record for purposes of an habitual offender prosecution does not constitute an unconstitutional grant of legislative power because it fails to articulate any standard as to when the record is to be forwarded to the district attorney since the statute requires transmission of the record within a reasonable time.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 27 October 1975 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 5 May 1976.

Pursuant to a petition filed under G.S. 20-223, the State sought to have defendant declared an habitual offender under G.S. 20-221.

After a show cause hearing, the trial court declared defendant an habitual offender of the State's traffic laws and barred him from operating a motor vehicle upon State highways. From said judgment, defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General William W. Melvin and Assistant Attorney General William B. Ray, for the State.

T. H. Suddarth, Jr., for defendant appellant.

MORRIS, Judge.

G.S. 20-227, G.S. 20-19(e) and G.S. 20-231 are the operative statutory provisions in defendant's first contention and before setting forth defendant's basic argument it would be helpful to review those three critical sections.

Under G.S. 20-227, enacted in 1969,

"No license to operate a motor vehicle in North Carolina shall be issued to an habitual offender,

(1) For a period of five years from the date of the judgment of the court finding such person to be an habitual offender and

(2) Until the privilege of such person to operate a motor vehicle in this State has been restored by judgment of the superior court division."

G.S. 20-19(e), enacted in its present substantive form in 1957, essentially provides that "when a license is revoked because of a third or subsequent conviction for driving or operating a motor vehicle while under the influence of intoxicating liquor or while under the influence of an impairing drug, occurring within 5 years after a prior conviction, the period of revocation shall be permanent; provided, that the Division may, after the expiration of three years, issue a new license . . ." upon compliance with certain conditions of behavior.

Finally, G.S. 20-231, enacted in 1969, provides in pertinent part that "[n]othing in this Article shall be construed . . . so as to preclude the exercise of the regulatory powers of any division, agency, department or political subdivision of this State having the statutory authority to regulate such operation and licensing."

Defendant, citing G.S. 20-231 and G.S. 20-19(e), contends that the trial court's entry of judgment abrogated the Division of Motor Vehicles' discretionary authority to regulate certain licensing procedures. We disagree.

[1] Our Supreme Court in *Cab Co. v. Charlotte,* 234 N.C. 572, 577, 68 S.E. 2d 433 (1951), stated the general principle of statutory interpretation that ". . . when the provisions of related statutes are irreconciliable, under reasonable interpretation, and one must give way to the other, ordinarily the last in point of enactment will prevail as being the latest expression of the legislative intent." We do not reach the question of whether these statutes are indeed irreconcilable, but suffice it to say that the five-year period of G.S. 20-227 must prevail over the three-year provision under G.S. 20-19(e) and we further hold that G.S. 20-227 does not undercut or abrogate the powers

vested in the Division of Motor Vehicles under G.S. 20-231. Once the habitual offender provisions are invoked, the seemingly inapposite statutory provisions must yield.

[2] Defendant further contends that G.S. 20-222, which provides that the Commissioner "shall certify" a defendant's driving record for purposes of an habitual offender prosecution, fails to articulate any standard as to *when* the record is to be forwarded to the District Attorney and thus constitutes an unconstitutional grant of legislative authority. We disagree.

When read critically, this statute requires transmission of the record within a reasonable time period and we can find no unconstitutional delegation of legislative power to the Commissioner. Simply stated, there is no constitutional infirmity under this statute.

Wherefore, the judgment of the trial court is

Affirmed.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. CLAXTON L. MAJETTE AND NORMAN GORDON

No. 769SC155

(Filed 7 July 1976)

1. **Criminal Law § 92— written motion to consolidate trials — sufficiency**

The State's written motion for joinder of defendants' trials complied with the requirements of G.S. 15A-951(a)(2) and (3) that motions set forth the grounds therefor and the relief sought where the motion set forth the joinder statute, G.S. 15A-926, as grounds therefor and showed that the relief sought was the joinder of the two cases for trial.

2. **Criminal Law § 112— instructions — reasonable doubt as possibility of innocence**

Defendants were not prejudiced by a portion of the charge defining reasonable doubt as a "possibility of innocence."

3. **Criminal Law §§ 111, 114— written jury instructions on elements of crimes**

The trial court did not invade the province of the jury or show favoritism to the State's case by giving the jury written instructions

with respect to the elements of felonious breaking and entering and felonious larceny pursuant to breaking and entering.

4. **Burglary and Unlawful Breakings § 6; Larceny § 8— possession of recently stolen property — erroneous application to both defendants**

In a consolidated trial of two defendants for breaking and entering and larceny, the trial court erred in applying the doctrine of possession of recently stolen property to both defendants where the State's evidence showed that the property was found in one defendant's house two days after it was stolen, and there was no evidence that the second defendant was ever in actual or constructive possession of the property, and the second defendant is therefore entitled to a new trial.

APPEAL by defendants from *Godwin, Judge.* Judgments entered 19 November 1975 in Superior Court, VANCE County. Heard in the Court of Appeals 26 May 1976.

Each defendant was indicted for breaking and entering and larceny. Defendants' motion for severance was denied, and the State's motion to join the cases for trial was allowed.

Daphine Williams testified that on 9 September 1975 her house was locked and in order when she left that morning. When she returned that afternoon she found that a back window had been broken out and her house ransacked. Items found missing included a radio, a stereo and tapes, frozen foods, a camera and a lawnmower. Williams stated that two days later she accompanied an officer to defendant Gordon's house and found her missing property.

Mrs. Laverne Burwell, a neighbor of Williams, testified that about 1:10 p.m. on 9 September 1975 she saw defendant Majette and another man coming out of the back door of the Williams house.

Defendants presented evidence of alibi. The jury found each defendant guilty as charged and from a judgment imposing prison sentences defendants appealed to this Court.

Attorney General Edmisten, by Associate Attorney Jerry B. Fruitt, for the State.

Rogers and Senter, by J. Larry Senter, for defendant appellants.

ARNOLD, Judge.

[1] Defendants assert that the court erred in allowing the State's motion to join their trials. They argue that the State

failed to comply with G.S. 15A-951(a)(2) and (3) which requires the grounds for the motion and the relief sought to be set forth in writing. Their argument is without merit. The written motion cited G.S. 15A-926, the joinder statute, as grounds for the motion, and the relief sought was adequately set forth, i.e., the joinder of the two cases for trial.

There is also no merit to defendants' contention that the court abused its discretion in allowing the joinder because defendants were not given adequate notice. Each defendant was indicted for the same offenses. We can find no abuse of discretion by the trial judge, and no prejudice to defendants by the joinder of their trials.

[2] Defendants contend that the trial judge improperly defined reasonable doubt in his initial definition of reasonable doubt. His Honor later instructed on the meaning of reasonable doubt substantially as approved in *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133 (1954), but defendants assert the initial definition of "reasonable doubt" in terms of a "possibility of innocence" was error. While the phrase "possibility of innocence" has not been approved it has been held to be more favorable to defendants than approved phrases, and thus defendants show no prejudice in this portion of the charge. *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745 (1972); *State v. West,* 21 N.C. App. 58, 203 S.E. 2d 86 (1974); *State v. Greene,* 17 N.C. App. 51, 193 S.E. 2d 331 (1972); *State v. Edwards,* 15 N.C. App. 718, 189 S.E. 2d 492 (1972); *State v. Chaney,* 15 N.C. App. 166, 189 S.E. 2d 594 (1972); *State v. Perry,* 13 N.C. App. 304, 185 S.E. 2d 467 (1971).

[3] Defendants also contend that the trial judge invaded the province of the jury and showed favoritism to the State's case by giving the jury written instructions with respect to the elements of felonious breaking and entering and felonious larceny pursuant to breaking or entering. The written instructions given the jury correctly stated the elements of each crime, and on the authority of *State v. Frank,* 284 N.C. 137, 146, 147, 200 S.E. 2d 169 (1973), we find no error in His Honor's use of written instructions.

[4] Defendant Majette assigns error to the failure of the trial judge to limit his instructions regarding the doctrine of possession of recently stolen property to defendant Gordon. There is merit in his position. The State's evidence established that the

property was found two days after it was stolen in defendant Gordon's house. In his charge the trial judge instructed the jury to apply the doctrine of possession of recently stolen property to both defendants.

The doctrine of possession of recently stolen property is a factual presumption whereby a person found in the unexplained possession of recently stolen property is presumed to be the thief. *State v. Lewis,* 281 N.C. 564, 189 S.E. 2d 216 (1972); *State v. Fink,* 26 N.C. App. 430, 216 S.E. 2d 473 (1975). No evidence was presented which tended to show that defendant Majette was ever in possession, actual or constructive, of the recently stolen property. The instructions to apply the doctrine of possession of recently stolen property were prejudicial error as to defendant Majette.

As to defendant Gordon—no error.

As to defendant Majette—new trial.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. HERMAN WINGO

No. 7620SC133

(Filed 7 July 1976)

Kidnapping § 1— failure to charge on G.S. 14-39

The trial court erred in failing to charge on the essential elements of kidnapping where the court charged only that kidnapping is the "taking and carrying away without lawful authority of a human being by force, threat of force, or fraud," but the court failed to charge on the provisions of G.S. 14-39 which became effective 1 July 1975.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 23 October 1975 in Superior Court, UNION County. Heard in the Court of Appeals 24 May 1976.

Defendant was tried on bills of indictment for kidnapping and armed robbery. The cases were consolidated for trial and the State presented Willie Young Jenkins III as its principal witness at trial. Jenkins testified that on 15 July 1975, while

he was in his car in the parking lot of the Waffle House in Monroe, the defendant entered his car on the passenger side, pulled out a handgun, and demanded his money. Jenkins stated that although he was frightened he explained to the defendant that he did not have any money. Defendant then ordered Jenkins to drive him to defendant's girl friend's house. When Jenkins stopped the car defendant proceeded to search the car, and he started to take a tape player. Jenkins asked defendant not to remove the tape player, and defendant reached for his pocket where he had placed his handgun. Defendant then took the tape player.

Police Sergeant W. R. Cook testified that pursuant to the report of Mr. Jenkins and his investigation of the crime, he observed a vehicle near the area where Jenkins had been robbed. Cook stated that he obtained permission to search the car and discovered the stolen tape player. The driver testified that he obtained the tape player from the defendant, Herman Wingo.

Defendant testified that he was not in Monroe during the period when Jenkins was robbed. Eddie Bivens testified and corroborated the defendant's alibi.

The jury returned guilty verdicts as to each charge. From judgment imposing an active sentence of not less than 20 nor more than 30 years defendant appealed to this Court.

Attorney General Edmisten, by Associate Attorney Alan S. Hirsch, for the State.

Joe P. McCollum, Jr., for defendant appellant.

ARNOLD, Judge.

We agree with defendant's position that the trial judge failed to properly instruct the jury on the elements of kidnapping. The jury was instructed that kidnapping was the "taking and carrying away without lawful authority of a human being by force, threat of force, or fraud."

Defendant was charged in an indictment with kidnapping which is a violation of G.S. 14-39. G.S. 14-39 (effective 1 July 1975) provides: "Any person who shall unlawfully confine, restrain, or remove from one place to another, any person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent

of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for ransom or as a hostage or using such other person as a shield; or

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person."

G.S. 1-180 requires the trial court to "declare and explain the law arising on the evidence given in the case." The provisions of G.S. 1-180 are mandatory and failure to comply is prejudicial error. *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765 (1970). The trial judge committed prejudicial error by failing to explain the essential elements of the crime charged. *State v. Hairr,* 244 N.C. 506, 94 S.E. 2d 472 (1956); *State v. Sutton,* 230 N.C. 244, 52 S.E. 2d 921 (1949); *State v. Pittman,* 12 N.C. App. 401, 183 S.E. 2d 307 (1971).

Defendant's contention that the trial judge erroneously failed to instruct the jury on the elements of common law robbery is without merit. All the evidence clearly supports the greater offense of armed robbery, and we find no error in the trial with respect to that charge.

Defendant was found guilty of separate offenses of kidnapping (#75CR5613) and robbery with a firearm (#75CR5614). A single judgment of imprisonment was rendered. Since we are awarding a new trial only as to the charge of kidnapping the single judgment must be vacated and remanded for proper judgment upon the guilty verdict in the charge of armed robbery. *State v. Hardison,* 257 N.C. 661, 127 S.E. 2d 244 (1962); *State v. Blackshear,* 10 N.C. App. 237, 178 S.E. 2d 105 (1970).

In No. 75CR5613 [kidnapping]—new trial.

In No. 75CR5614 [armed robbery]—remanded for proper judgment.

Judges PARKER and HEDRICK concur.

HAROLD O. ALLIGOOD v. ED HENNING

No. 762DC269

(Filed 7 July 1976)

Contracts § 27— oral contract for landscaping services — breach — sufficiency of evidence

Evidence was sufficient for the jury to determine that there was an oral contract between the parties whereby plaintiff obligated himself to do landscaping work around defendant's restaurant, defendant breached the contract, and plaintiff was entitled to recover $1306 from defendant for work performed before the breach.

APPEAL by defendant from *Ward, Judge.* Judgment entered 14 November 1975 in District Court, BEAUFORT County. Heard in the Court of Appeals 17 June 1976.

Carter & Ross, by W. B. Carter, for plaintiff appellee.

Wilkinson & Vosburgh, by James R. Vosburgh, for defendant appellant.

VAUGHN, Judge.

Plaintiff offered evidence tending to show the following:

Defendant is the franchise owner and operator of a restaurant. Plaintiff is engaged in the business of landscaping and land clearing. Defendant needed some landscaping work done around the restaurant which was then under construction. Plaintiff told defendant that he was not interested in designing the landscape plan but that he would furnish the labor, equipment and materials. Defendant agreed to pay John Alpar $100.00 to draw up the plan. Plaintiff and defendant agreed that plaintiff would furnish the labor and equipment at an hourly rate of $15.00 and be reimbursed for the cost of materials used on the job. Before plaintiff ever started the project, he told defendant that Alpar was dragging his feet "and would not prepare the plan." Defendant told plaintiff that he would talk with Alpar. Later defendant told plaintiff to go ahead and start the project. At that time, Alpar had not prepared a written plan and he never did prepare such a plan. Plaintiff moved his equipment to the job site and started work. Alpar visited the site and made oral suggestions and plaintiff carried them out. Defendant was present during some of these conversations. Defendant visited the site from time to time and

never expressed any objections to the work that was being done. Defendant wrote one check for $50.00 payable to Alpar and plaintiff delivered the check. While plaintiff was attempting to do the work he was employed to do, another grading contractor was on the site doing some work. Plaintiff felt that he was moving some dirt that should have been moved by that contractor and called this to defendant's attention. On one day, plaintiff arrived at the site and saw someone else there also doing landscaping work. He told defendant that if defendant had someone else to finish the job, he would leave. Defendant told plaintiff to submit his bill. The next day, plaintiff submitted his bill for labor and equipment in the amount of $1425.00 and for materials purchased in the amount of $550.00 for a total of $1975.00. Defendant then told him to make up two separate bills, one for $1450.00 and another for $525.00, and plaintiff did this. The $525.00 was for the work that plaintiff did that both plaintiff and defendant thought should have been done by the other grading contractor. Plaintiff did this so that defendant could submit the $525.00 bill to the general grading contractor. Plaintiff never agreed to reduce his bill by that amount. Defendant has never paid plaintiff anything.

Defendant denied the material allegation of the complaint. He alleged that plaintiff agreed to landscape the premises according to plans to be drawn by Alpar and that "it was the understanding of the defendant" that the project would cost $1,000.00. Defendant counterclaimed for $1,325.00 minus a $610.00 set-off as the value of plaintiff's services and offered evidence tending to show that plaintiff had breached the contract.

The jury found that there was a contract between the parties as alleged by plaintiff, that defendant breached the contract and that plaintiff was entitled to recover $1306.00 from defendant.

Defendant first contends that the court should have entered a directed verdict against the plaintiff. We have carefully considered defendant's argument in support of that contention but cannot agree with him. We have set out plaintiff's evidence in some detail, and it appears clear to us that the case was one for the jury.

Defendant's other two assignments of error are based on the single contention that the judge erred when he did not sub-

mit additional issues as requested by defendant. Ordinarily, the form and the number of the issues is a matter that rests in the discretion of the trial judge. The issues as submitted were sufficient to present the material questions that were in dispute and to give plaintiff and defendant the full benefit of their contentions before the jury. Moreover, there was no objection to the issues that were submitted. The jury's answers to those issues would have precluded consideration of the issues proposed by defendant, even if they had been submitted.

We find no errors of law that require a new trial.

No error.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. T. G. BURCHFIELD

No. 7627SC231

(Filed 7 July 1976)

Receiving Stolen Goods § 6— instructions — reasonable grounds for believing goods stolen — crime prior to 1975 amendment to statute

The trial court erred in instructing the jury that it could convict defendant of receiving stolen goods if it found defendant knew "or had reasonable grounds to believe" the goods were stolen where the offense allegedly occurred prior to the amendment to G.S. 14-71 effective on 1 October 1975.

APPEAL by defendant from *Falls, Judge.* Judgment entered 21 January 1976 in Superior Court, GASTON County. Heard in the Court of Appeals 14 June 1976.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis, for the State.

Robert C. Powell, for defendant appellant.

VAUGHN, Judge.

Defendant was convicted of feloniously receiving stolen goods. Judgment imposing a prison sentence of not less than 9 nor more than 10 years was entered. Since an erroneous portion of the charge requires that we order a new trial, we consider it unnecessary to set out the facts of the case.

The judge, in his charge to the jury, repeatedly told the jury they might convict if they found ". . . defendant knew *or had reasonable grounds to believe . . .*" that the goods were stolen. Jury instructions of like import have been consistently disapproved when guilty knowledge was an element to be proved. In *State v. Grant*, 17 N.C. App. 15, 193 S.E. 2d 308, we held that the trial court had erred in instructing the jury in a prosecution for feloniously receiving stolen goods, when it said that the defendant had guilty knowledge if he "had good reason to believe" that the property was stolen. We based our opinion in that case, as we must in this one, on such relevant decisions as *State v. Miller*, 212 N.C. 361, 193 S.E. 388 and *State v. Stathos*, 208 N.C. 456, 181 S.E. 273.

> " 'To reasonably believe' and 'to know' are not interchangeable terms. While the latter may be implied or inferred from circumstances establishing the former, it does not follow that reasonable belief and implied knowledge are synonymous. The state must establish that the defendant received the goods 'knowing the same to have been feloniously stolen or taken,' and this is not necessarily accomplished by establishing the existence of circumstances 'such as to cause the defendant to reasonably believe' the goods were stolen. Knowledge connotes a more certain and definite mental attitude than reasonable belief, and whether knowledge is implied from circumstances sufficient to establish reasonable belief is a question for the jury." *State v. St. Clair*, 17 N.C. App. 22, 193 S.E. 2d 404.

The relevant statute, G.S. 14-71, "Receiving Stolen Goods," was amended to include the language "or having reasonable grounds to believe" as of 1 October 1975. The indictment in this case alleges the commission of the crime "on or about the 7th day of August, 1975." The defendant was therefore entitled to an instruction on the offense as defined in G.S. 14-71 prior to 1 October 1975. The judge's instruction, based on the statute as amended, was prejudicial and requires that we order a new trial.

Defendant's assignment of error, based on the failure to dismiss because of the alleged failure to conduct a preliminary hearing, is overruled.

Defendant's assignments of error, based on the alleged insufficiency of the verdict, are overruled. The verdict, as re-

turned by the jury and accepted by the court, was sufficient to support the judgment imposing punishment for feloniously receiving stolen goods.

The other alleged errors may not occur at the next trial of the case and will not be reviewed on this appeal.

For error in the charge, there must be a new trial.

New trial.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. JOSEPH O. GILBERT

No. 7610SC168

(Filed 7 July 1976)

Criminal Law § 149— not guilty verdict — no right of State to appeal

Where defendant parked in a "no parking" zone in the city, failed to pay a penalty of $1.00 for such violation, and the district court entered a special verdict of not guilty on behalf of defendant, the State had no right of appeal.

APPEAL by the State from *Alvis, Judge.* Judgment entered 15 January 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 27 May 1976.

Defendant was charged in a warrant with violating Chapter 21 of the Code of the City of Raleigh by parking his Fiat automobile in a "no parking" zone on Avent Ferry Road in the City of Raleigh. Prior to the issuance of the warrant, defendant received a "Parking Citation" ticket. The citation notified defendant that if he did not pay a penalty within 48 hours, a warrant would be issued. Section 21-12(c) of the City Code provides a penalty of $1.00 for the violation with which defendant was charged. Section 21-12(g) provides that penalties paid for such parking violations shall be paid into the general fund of the City. Defendant has admitted that he parked in the prohibited area.

Defendant did not pay the penalty provided by the City Code, and the warrant upon which defendant was arraigned in

district court was issued. In district court defendant challenged the constitutionality of the procedure of initiating criminal prosecutions for only those persons who do not pay to the City the penalty provided by the City Code. The district court judge concluded that "the enforcement of the parking laws in the City of Raleigh is unconstitutional as presently applied." The district court judge then decreed as follows:

> "NOW, THEREFORE, it is hereby ORDERED ADJUDGED AND DECREED that a Special Verdict of 'not guilty' be entered on behalf of defendant in this cause."

The State appealed to superior court. Upon appeal, Judge Alvis heard the case upon the record of the district court and affirmed the judgment of the district court.

The State appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General Charles M. Hensey and Associate Attorney Cynthia J. Zeliff, for the State.

L. Philip Covington for the defendant.

Walter L. Horton, Jr., on the *amicus curiae* brief of the City of Raleigh.

BROCK, Chief Judge.

The disposition of this appeal is governed by the principles declared in *State v. Harrell,* 279 N.C. 464, 183 S.E. 2d 638 (1971).

As in *Harrell,* it may be that the district court judge in the present case only intended to declare the City Code unconstitutional as applied. However, he went further and found defendant "not guilty." The district court had exclusive original jurisdiction of the offense for which defendant was arraigned, and the judge had jurisdiction to enter final judgment. The denomination of his verdict as a "special verdict" of not guilty does not change its real character as a general verdict of not guilty. If the district court judge had intended to rely upon his conclusion that the City Code was unconstitutional as applied, he should have so stated and dismissed the action. General Statute 15-179(6) would then have permitted the State to appeal. However, the State had no right of appeal from a verdict of not guilty.

Since the defendant was found not guilty in the district court, the attempted appeal by the State brought nothing to the superior court. Since the superior court did not acquire jurisdiction, the proceedings in the superior court are a nullity. Likewise, this Court has acquired no jurisdiction by the State's attempted appeal from the superior court.

Appeal dismissed.

Judges BRITT and MORRIS concur.

BALL PHOTO SUPPLY CO., INC. v. [MRS.] B. F. McCLAIN

No. 7628DC243

(Filed 7 July 1976)

Courts § 11.1; Rules of Civil Procedure § 5— appeal from magistrate to district court — method of serving notice

Notice of appeal from a magistrate to the district court need not be served by a judicial officer or be accepted by the appellee, but is sufficient if served upon appellee's attorney by mail. G.S. 1A-1, Rule 5(b).

APPEAL by plaintiff from *Weaver, Judge.* Order entered 2 November 1975 in District Court, BUNCOMBE County. Heard in the Court of Appeals 15 June 1976.

Plaintiff instituted this action in Small Claims Court to recover $96.43 on an account. Defendant answered and denied the debt and asserted a counterclaim against the plaintiff for $452.84. After hearing the evidence the magistrate found that "the defendant has been injured by the plaintiff in an amount equal to the amount sued for by the plaintiff in this action," and the action was dismissed.

Plaintiff filed notice of appeal to District Court and served the notice upon defendant's attorney by mail. Defendant filed a Motion to Dismiss the appeal in the District Court on the basis that service was improper. The District Court dismissed the appeal, and plaintiff appealed to this Court.

Lentz and Ball, P.A., by Ervin L. Ball, Jr., for plaintiff appellant.

Morris, Golding, Blue and Phillips, by James N. Golding, for defendant appellee.

ARNOLD, Judge.

The District Court agreed with defendant's position that it was necessary for notice of appeal from a magistrate to the district court to be served by a judicial officer or accepted by the appellee. We agree with plaintiff's position that service by mail was proper, and that it was error to dismiss the appeal.

G.S. 7A-228 provides the manner in which an appeal from a magistrate to the district court is perfected: "Appeal is perfected by serving written notice thereof on all other parties and by filing written notice with the clerk of superior court within 10 days after rendition of judgment." Defendant relies upon G.S. 1-282 and cases cited thereunder holding that service must be by an officer unless accepted by the appellee. G.S. 1-282 was replaced by the new Rules of Appellate Procedure which do not apply to appeals from a magistrate to district court for trial de novo under G.S. 7A-228 et seq. (See Commentary to App. Rule 1.)

G.S. 1A-1, Rule 5(b) states that "With respect to such other pleadings and papers service upon the attorney or upon a party may also be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by filing it with the clerk of court." We hold that this rule applies to the service of notice of appeal from a magistrate to the district court.

The order of the District Court dismissing the appeal is

Reversed.

Chief Judge BROCK and Judge PARKER concur.

THOMAS EUGENE COFFER v. STANDARD BRANDS, INC.

No. 7621SC158

(Filed 21 July 1976)

1. **Food § 1— manufacturers, processors, packagers of food — negligence — burden of proof — res ipsa loquitur inapplicable**

Manufacturers, processors, and packagers of food, and bottlers of drink intended for human consumption are held to a high degree of responsibility to the ultimate consumer to see that the food and drink are not injurious to health, and may be held liable by the ultimate consumer on the ground of negligence for injuries proximately resulting from the failure to use such care; however, the doctrine of *res ipsa loquitur* does not apply, and the burden of proof rests on plaintiff to establish negligence.

2. **Food § 1— roasted nuts — unshelled filbert — no negligence of manufacturer**

In an action to recover for injury to plaintiff's teeth sustained when he bit down on an unshelled nut which was packaged in one of defendant's products, Planters Dry Roasted Mixed Nuts, plaintiff made no showing of negligence and introduced no proof of similar occurrences.

3. **Food § 1; Uniform Commercial Code § 15— roasted nuts — unshelled filbert — no express warranty that nuts were shelled**

Evidence did not support plaintiff's contention that defendant breached an express warranty that mixed nuts sold by defendant in a clear glass jar were all shelled, since there was no language on the label of the container representing that the nuts were shelled and since the clear jar in which the nuts were packaged was a mere passive marketing tool and not a representation within the meaning of G.S. 25-2-313(1)(a), (b).

4. **Food § 1; Uniform Commercial Code § 15— mixed nuts — unshelled filbert — merchantability of nuts**

The mixed nuts marketed by defendant were merchantable notwithstanding the presence of an unshelled filbert, since the presence of limited quantities of unshelled nuts does not render shelled nuts objectionable in the trade within the meaning of G.S. 25-2-314(2)(a).

5. **Food § 1; Uniform Commercial Code § 15— mixed nuts — presence of unshelled nuts — product not adulterated — merchantability**

A certain limited number of naturally occurring unshelled filberts is permissible without rendering the product, dry roasted mixed nuts, adulterated, and as such the mixed nuts are fit for ordinary purposes and merchantable under G.S. 25-2-314(2)(c).

6. **Food § 1; Uniform Commercial Code § 15— dry roasted mixed nuts — unshelled filbert — no foreign substance — no breach of implied warranty of merchantability**

Plaintiff who sued for injury to his teeth sustained when he bit down on an unshelled filbert which was in a package of dry roasted

mixed nuts cannot claim that the filbert was a foreign substance, since the presence of natural impurities is no basis for liability; therefore, there was no breach of an implied warranty of merchantability.

7. **Food § 1— strict liability — defective product unreasonably dangerous to health**

In order for strict liability to obtain, the product must be not only defective but present an unreasonable danger to health.

8. **Food § 1— mixed nuts — unshelled filbert — strict liability inapplicable**

In an action by plaintiff to recover for injury to his teeth sustained when he bit down on an unshelled filbert which was contained in dry roasted mixed nuts packaged by defendant, strict liability did not apply, since the product in question was not defective, nor did it present an unreasonable danger to health and safety.

APPEAL by plaintiff from *Crissman, Judge.* Judgment entered 21 January 1976 in Superior Court, FORSYTH County. Heard in the Court of Appeals 27 May 1976.

Allegations in plaintiff's complaint are summarized in pertinent part as follows:

Defendant is a New York corporation, registered in North Carolina "for the general manufacturing of its products"; and "defendant goes on a daily and regular basis manufacture and sell its products in the State of North Carolina." On or about 1 April 1974 plaintiff purchased a bottle of "Planters Dry Roasted Mixed Nuts," a product manufactured by defendant and sold and distributed by it in North Carolina. Plaintiff purchased the product in its original and unopened container from a food store in Greensboro.

Thereafter, plaintiff opened the bottle and, as he was eating some of the nuts therefrom, he bit down on a nut that had not been shelled, resulting in damage to his teeth. He suffered great pain as a result of the incident and has incurred considerable expense in getting his teeth repaired. Defendant is liable to plaintiff on theories of negligence, breach of express warranty, breach of implied warranty, and strict liability in tort.

In its answer defendant denied the material allegations of the complaint. It further alleged additional defenses of (1) failure of the complaint to state a claim upon which relief can be granted, (2) lack of privity of contract between plaintiff and defendant, and (3) contributory negligence on the part of plaintiff.

At trial plaintiff was the only witness presented. His testimony with respect to purchasing and eating the nuts and resulting injury was substantially as alleged in the complaint. A bottle similar to the one purchased was introduced as an exhibit; also introduced was the nut complained of which was identified as an unshelled filbert. On cross-examination he testified that the bottle contained different types of nuts including filbert, cashew, pecan and almond; that they were of different sizes, some small and some larger than others.

At the close of the evidence defendant's motion for directed verdict was allowed and from judgment dismissing the action, plaintiff appealed.

Wilson and Morrow, by John F. Morrow, for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr., for defendant appellee.

BRITT, Judge.

Did the trial court err in granting defendent's motion for directed verdict and dismissing the action? We hold that it did not.

NEGLIGENCE

[1] Manufacturers, processors, and packagers of food, and bottlers of drink intended for human consumption, are held to a high degree of responsibility to the ultimate consumer to see that the food and drink are not injurious to health, and may be held liable by the ultimate consumer on the ground of negligence for injuries proximately resulting from the failure to use such care. *Terry v. Double Cola Bottling Company,* 263 N.C. 1, 138 S.E. 2d 753 (1964). Accordingly, a person injured by a harmful or deleterious substance in food or drink resold in the original container may recover from the manufacturer upon the theory of negligence. *Smith v. Coca-Cola Bottling Company,* 213 N.C. 544, 196 S.E. 822 (1938). However, the doctrine of *res ipsa loquitur* does not apply and the burden of proof rests on plaintiff to establish negligence. *Styers v. Winston Coca-Cola Bottling Company,* 239 N.C. 504, 80 S.E. 2d 253 (1954). Direct proof of negligence is not required and negligence may be established by relevant facts and circumstances from which

it may be inferred. *Styers v. Winston Coca-Cola Bottling Company, supra.* Negligence of the manufacturer or processor may be established by proof of similar occurrences transpiring within reasonable proximity of time. *Tickle v. Hobgood,* 216 N.C. 221, 4 S.E. 2d 444 (1939); *Smith v. Coca-Cola Bottling Company, supra.*

[2] In the instant case plaintiff made no showing of negligence, and he introduced no proof of similar occurrences. In *Tedder v. Pepsi-Cola Bottling Company,* 270 N.C. 301, 154 S.E. 2d 337 (1967), our Supreme Court held that negligence on the part of a bottler is not established by the showing that one bottle alone out of some eight million contained a deleterious substance. While the evidence in the instant case did not show the number of bottles of mixed nuts processed and packaged by defendant, the inference was that the number was substantial. We think plaintiff fell far short of establishing liability on the ground of negligence.

BREACH OF WARRANTY

A. Privity of Contract.

The actionability of plaintiff's claims under a theory based on express or implied warranty, are limited by requirement of privity of contract. Privity still obtains in this jurisdiction and would bar any suit by an injured consumer against one other than his immediate seller unless the suit falls within one of the many exceptions to the rule. *Gillispie v. Bottling Co.,* 17 N.C. App. 545, 195 S.E. 2d 45 (1973), *cert. denied,* 283 N.C. 393, 196 S.E. 2d 275 (1973); *e.g., Gillispie v. Bottling Co.,* 14 N.C. App. 1, 187 S.E. 2d 441 (1972).

While the principle of privity has been eroded in this jurisdiction in cases involving food and drugs, merchandised in sealed containers, it does not appear that the principle in those cases has been completely abolished. In *Tedder v. Pepsi-Cola, supra,* the court held that because of advertising and sales promotion by the bottler addressed to the consumer the principle of privity did not apply.

In the instant case plaintiff presented no evidence of advertising and sales promotion by defendant addressed to the consumer. Therefore, we are assuming only *arguendo* that there was privity between plaintiff and defendant as we proceed to consider the questions of express and implied warranty.

B. Express Warranty.

[3] Plaintiff contends that defendant breached an express warranty that the mixed nuts were all shelled. The evidence does not support this position. The only language appearing on the label of the container is as follows:

"PLANTERS
Dry Roasted
MIXED NUTS
no oils or sugar
used in processing"

Nowhere does there appear a representation that the nuts contained in the jar were shelled. The Uniform Commercial Code as adopted in North Carolina, Chapter 25 of the General Statutes, mandates that in order for an express warranty to be effective, a manufacturer's representations must be a part of the basis of the bargain. G.S. 25-2-313(1)(a). Plaintiff argues that the container, a clear glass jar, which allegedly failed to disclose the unshelled filbert, was a representation within the meaning of G.S. 25-2-313(1)(a), (b). We feel that use of the jar, while revealing shelled nuts, was a mere passive marketing tool. It was not an affirmative representation and as such was insufficient to give rise to an express warranty. *Performance Mtr's Inc. v. Allen,* 280 N.C. 385, 186 S.E. 2d 161 (1972).

C. Implied Warranty.

First, we consider plaintiff's claim in the light of the Uniform Commercial Code and defendant's implied warranty of merchantability under G.S. 25-2-314(1). Unless excluded or modified pursuant to G.S. 25-2-316, this warranty arises as a matter of law where the seller is a merchant with respect to the goods in question under G.S. 25-2-104(1). Some basis for determining the merchantability of goods is provided in G.S. 25-2-314(2). This subsection provides as follows:

"(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any."

We feel that the goods were impliedly warranted to be nuts, a natural incident of which were the shells. As such they were fit for the ordinary purposes under G.S. 25-2-314(2)(c). The argument could be made that the clear glass jar revealing only shelled nuts was a "promise or affirmation of fact" as provided in G.S. 25-2-314(2)(f). However, we feel that this approach is inconsistent with the nature of the goods at issue and G.S. 25-2-314(2)(c).

In assessing the merchantability of goods under G.S. 25-2-314(2)(a) thru (f), various state and federal regulatory acts are instructive. This is especially pertinent in regard to a determination of merchantability under G.S. 25-2-314(2)(a), (c).

Under G.S. 106-22(9), 106-67.7 and 106-195 the Commissioner of Agriculture and the North Carolina Board of Agriculture are empowered to make and adopt rules and regulations governing the sale of mixed nuts. *See, e.g.,* G.S. 150A-14, effective 1 February 1976. The Board has adopted certain federal standards issued under the Agricultural Marketing Act of 1946, 7 U.S.C. § 1621 et seq. (1970). *See* 2 N.C.A.C. 15K.0217 (1976). These standards govern determination of the quality and merchantability of such nuts. 7 C.F.R. § 51.2(d) (1976). These standards provide that mixed nuts are to contain certain individual varieties within certain percentages. The quality of the mixture is determined by application of the respective standards of quality and merchantability for each variety represented in the mixture, 7 C.F.R. § 51.3520 (1976).

While there appear to be no standards governing the permissible limits for presence of unshelled filberts in a lot of otherwise shelled nuts, such standards do exist for peanuts.

SHELLED PEANUTS

ALLOWABLE UNSHELLED CONCENTRATION

Peanut Variety	Allowable Unshelled	Reference
U.S. No. 1 Runner	1.50%	7 C.F.R. § 51.2710 (a) (3) (1976)
U.S. No. 2 Runner	2.50%	7 C.F.R. § 51.2712 (a) (2) (1976)
U.S. Runner Splits	2.00%	7 C.F.R. § 51.2711 (a) (2) (1976)
U.S. No. 1 Spanish	1.50%	7 C.F.R. § 51.2730 (a) (3) (1976)
U.S. No. 2 Spanish	2.50%	7 C.F.R. § 51.2732 (a) (2) (1976)
U.S. Spanish Splits	2.00%	7 C.F.R. § 51.2731 (a) (2) (1976)
U.S. Ex.L. Virginias	1.00%	7 C.F.R. § 51.2750 (a) (3) (1976)
U.S. Med. Virginias	1.25%	7 C.F.R. § 51.2751 (a) (3) (1976)
U.S. No. 1 Virginias	1.25%	7 C.F.R. § 51.2752 (a) (3) (1976)
U.S. No. 2 Virginias	2.50%	7 C.F.R. § 51.2754 (a) (2) (1976)
U.S. Virginia Splits	2.00%	7 C.F.R. § 51.2753 (a) (2) (1976)
Average Unshelled	1.82%	

The range allowable is from 1.00% to 2.50% with an average of 1.82% unshelled peanuts per unit of shelled peanuts. We find these figures highly persuasive in establishing merchantability under G.S. 25-2-314(2)(a). They serve to indicate that in the context of the peanut industry as a regulated trade, there is some tolerance for unshelled nuts in a lot of shelled nuts.

[4] Since mixed nuts are subject to the same standards as individual varieties, it logically follows that as in case of peanuts there is some tolerance in the trade for unshelled filberts as well. Thus the mixed nuts marketed by defendant were merchantable notwithstanding the presence of an unshelled filbert, since the presence of limited quantities of unshelled nuts does not render shelled nuts objectionable in the trade within the meaning of G.S. 25-2-314(2)(a).

G.S. 25-2-314(2)(c) provides that goods are merchantable when they are fit for ordinary purposes. As a food defendant's mixed nuts are subject to various state and federal regulatory acts dealing with the quality of food goods. G.S. 106-129 dealing with adulterated foods is instructive.

" . . . A food shall be deemed to be adulterated:

(1) a. If it bears or contains any poisonous or deleterious substance which may render it injurious to health; *but in case the substance is not an added substance* such food shall not be considered adulterated under this para-

graph if the quantity of such substance in such food does not ordinarily render it injurious to health; . . . . " (Emphasis added.)

This language is amplified in regulations promulgated under the Federal Food Drug and Costmetic Act 21 U.S.C. § 342 et seq. (1970). *See, e.g.,* 21 C.F.R. § 122.1(b) (1975). These regulations have been adopted by the State Board of Agriculture pursuant to G.S. 106-128 and are currently in effect in North Carolina. *See* 2 N.C.A.C. 9B.0008 (1976).

[5] Thus, it appears by statute and regulation that a certain limited amount of naturally occurring unshelled filberts is permissible without rendering the food goods adulterated. As such they are fit for ordinary purposes and merchantable under G.S. 25-2-314(2)(c).

[6] Plaintiff can find no comfort in the foreign substance doctrine as the unshelled filbert was not a foreign substance. It is well recognized in this and other jurisdictions passing on the question that the presence of natural impurities is no basis for liability. *Adams v. Great Atl. & Pac. Tea Co.,* 251 N.C. 565, 112 S.E. 2d 92 (1960); *Webster v. Blue Ship Tea Room, Inc.,* 347 Mass. 421, 198 N.E. 2d 309 (1964).

In *Adams,* the plaintiff alleged that he broke a tooth while eating cornflakes when he bit down on a part of a grain of corn which had crystalized into a state as hard as quartz. Plaintiff sued on the theory of implied warranty and the trial court entered judgment of involuntary nonsuit. The Supreme Court affirmed the judgment on the ground that the crystalized grain of corn was not a foreign substance but was a natural part of the original food not removed in processing, and its presence should have been anticipated by the consumer.

Recovery was denied in numerous cases from other jurisdictions where the impurity was a natural incident of the food. *See: Allen v. Grafton,* 170 Ohio St. 249, 10 Ohio Ops. 2d 289, 164 N.E. 2d 167 (1960) (oyster shell in oyster stew); *Shapiro v. Hotel Statler Corp.,* 132 F. Supp. 891 (S.D. Cal. 1955) (fish bone in fish stew); *Lamb v. Hill,* 112 Cal. App. 2d 41, 245 P. 2d 316 (1952) (chicken bone in chicken pie); *Silva v. F. W. Woolworth Co.,* 28 Cal. App. 2d 649, 83 P. 2d 76 (1938) (fragment of turkey bone in roast turkey).

Since the impurity complained of in this case was a natural incident of the goods in question, we feel that there was no breach of the implied warranty of merchantability.

STRICT LIABILITY IN TORT

Plaintiff contends this appeal should be governed by the rule of strict liability in tort. While there appears some support for his position in some of our cases, we decline to adopt strict liability as a premise for disposition of this case. *Terry v. Double Cola Bottling Co., supra.*

[7] Assuming, *arguendo,* the viability of strict liability in tort in North Carolina, it is clear that plaintiff has failed to bring defendant within the ambit of the rule. In order for strict liability to obtain, the product must be not only defective but present an unreasonable danger to health. *Kassab v. Central Soya,* 432 Pa. 217, 246 A. 2d 848 (1968); *Greenman v. Yuba Power Products, Inc.,* 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P. 2d 897 (1963). Strict liability is a substantially more narrow basis of liability than breach of implied warranty of merchantability under G.S. 25-2-314(1). J. White and R. Summers, Uniform Commercial Code § 9-7 (1972). It appears clear that certain commodities such as food and drugs cannot be manufactured without some element of risk due to their very nature. *See* Restatement (Second) of Torts § 402A, comment i, k (1965).

[8] Thus, the facts of plaintiff's case do not appear consistent with a strict liability theory. The product in question was not defective, nor did it present an unreasonable danger to health and safety.

CONCLUSION

So long as defendant's goods are merchantable there is no breach of implied warranty. Absent evidence of negligence and express warranty, and given the present posture of strict liability in this jurisdiction, we discern no basis for liability.

For the reasons stated, the judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. WILLIAM DONALD HAMRICK

No. 7627SC238

(Filed 21 July 1976)

1. **Criminal Law § 34— murder prosecution — separate robbery committed by defendant — evidence admissible**

The trial court in a first degree murder prosecution did not err in admitting testimony by a witness concerning a plan by the witness, defendant and the murder victim to rob the witness's father, defendant's statement after that robbery that the murder victim claimed he had lost the money taken from the robbery victim, and defendant's statement that he might have to kill somebody after the witness told him about the murder victim's having spent a lot of money lately, since evidence of defendant's commission of the separate offense of robbery was admissible becauses it tended to show intent, design, and a chain of circumstances concerning the offense charged.

2. **Criminal Law § 75— intoxicated defendant — incriminating statements made to witness — testimony admissible**

The trial court in a first degree murder prosecution did not err in allowing into evidence testimony by a witness concerning incriminating statements which defendant purportedly made to her, though defendant contended that he was so intoxicated from liquor and drugs at the time that he was unconscious of the meaning of his words, since there was evidence to support the trial court's findings that any drugs and liquor consumed by defendant were voluntarily consumed by him, defendant's intoxication, if any, did not amount to mania, and defendant was aware of what he was saying and doing when he made the statements.

3. **Criminal Law § 87; Witness § 1— witness not on list furnished defendant — testimony proper**

Defendant was not prejudiced by the trial court's refusal to strike the testimony of a witness whose name was omitted from a list furnished defendant by the district attorney prior to trial, since the trial court offered defendant sufficient time to prepare for the proposed testimony of the witness, and defendant was in fact able to obtain two witnesses, prisoners, whose testimony tended to contradict the State's witness.

4. **Homicide § 27— instruction on manslaughter — insufficient evidence to require**

In a prosecution for first degree murder testimony by a witness that defendant told her that he and the murder victim had gotten into an argument prior to the killing was not sufficient to support a charge on voluntary manslaughter.

5. **Homicide § 26— second degree murder — instruction on malice proper**

The trial court's charge on second degree murder properly informed the jury that malice was an essential element of second degree murder.

State v. Hamrick

APPEAL by defendant from *Fountain, Judge.* Judgment entered 28 July 1975 in Superior Court, LINCOLN County. Heard in the Court of Appeals 15 June 1976.

Defendant was indicted and tried for the first degree murder of Rudolph Lemmons. Trial was removed from Cleveland to Lincoln County. A previous trial ended with a hung jury, and upon retrial the State presented the following evidence:

Sylvia Lemmons testified that she took her husband to a tavern about 3:00 p.m. on 12 March 1974. She returned home and never saw her husband alive again. Susan Williams, employee at the tavern to which Sylvia Lemmons had carried her husband, testified that defendant came to the tavern around 5:30 p.m. on 12 March 1974, and that defendant and Rudolph Lemmons left there together.

Max Hamrick (not related to defendant) testified that he and another farmer discovered Rudolph Lemmons' body in a field on the morning of 13 March 1974, and they notified the sheriff. A wallet and a photograph of a little girl were found near the body.

Dr. Gentry testified concerning the autopsy he performed and stated that Lemmons died as a result of one of the wounds received from four .22 caliber bullets he removed. Officer Putnam testified that Max Hamrick led him to the body, and that he recognized the body as that of Rudolph Lemmons.

Johnny Black testified that while they were in prison he and defendant discussed the possibility of robbing Black's father, and that after their release from prison he, defendant and Rudolph Lemmons drew up plans for defendant and Lemmons to commit the robbery. Black stated that his father was robbed, and thereafter defendant complained to him that Lemmons contended he had lost the money which they had obtained from the robbery. Black further testified that on 12 March 1974, in response to defendant's inquiry, he, Black, told defendant that Lemmons had been spending a lot of money lately, and defendant then "said he might kill somebody tonight."

Dale Newton testified that she was with defendant and his wife at Myrtle Beach in August, 1974, and that defendant's wife left, following an argument with defendant. She stated that defendant had been drinking and that he had taken a tablet of the drug THC. Newton testified further that while she and defend-

ant were eating in a restaurant defendant told her that he had killed Lemmons because Lemmons had kept all the money from the robbery of Black's father. She stated that defendant further told her that before killing him defendant forced Lemmons to lock at a picture of his (Lemmons') daughter, and that defendant offered her $1,000 to find Johnny Black so that he could kill Black.

SBI agents testified concerning the bullets taken from Lemmons' body, and one of the agents expressed his opinion that all four bullets were fired from the same revolver and from a distance of no greater than three feet. Mrs. Lemmons also was recalled, and she identified the picture found near the body as that of their daughter.

Finally the State presented Richard Crisp who testified that in April, 1975, while he and defendant were in Central Prison, defendant told him about killing Lemmons after Lemmons kept the money obtained from a robbery, and that defendant had confessed the killing to Dale Newton.

Defendant presented Billy Dix and Wayne Enzor who testified that while in Central Prison defendant had discussed with them the murder charge pending against him in the presence of Richard Crisp, but that defendant had never admitted killing Lemmons.

Defendant's wife testified concerning the trip to Myrtle Beach and said that defendant was drunk and Dale Newton was "high" when she left, and that defendant had become angry with her and slapped her because she had brought Dale Newton to the beach with her.

Montie Britt testified that he was also along on the trip to Myrtle Beach, and that defendant and Dale Newton were drinking, and that he returned to the motel room late at night and found defendant and Dale Newton asleep in the same bed.

Defendant testified and denied any part in the robbery of Black's father, but said that he had heard Johnny Black and Lemmons discuss the robbery. He denied having any disagreement with Lemmons, and testified that he made his living selling marijuana and that Lemmons often helped him. Defendant also testified that Lemmons called him and asked for a ride on 12 March 1974, and that he took Lemmons home and never saw

him again. Defendant denied making incriminating statements to Dale Newton or anyone at Central Prison.

Defendant was found guilty of second degree murder and sentenced to 30 years. He appealed.

Attorney General Edmisten, by Assistant Attorney General Charles J. Murray and Assistant Attorney Joan Byers, for the State.

Julian B. Wray and John D. Church for defendant appellant.

ARNOLD, Judge.

[1] We reject defendant's contention that the trial court erred in admitting testimony by Johnny Black concerning the plan to rob Black's father, defendant's statement after that robbery that Lemmons claimed he had lost the money taken from Black, and defendant's statement that he might have to kill somebody after Black told him about Lemmons having spent a lot of money lately. Defendant argues the general rule that in a prosecution for one crime the State cannot offer evidence tending to show that the accused has committed another distinct, independent or separate offense. However, the instant case falls within the exception that allows evidence of another offense where it tends to show *quo animo,* intent, design, guilty knowledge, make out the *res gestae,* or shows a chain of circumstances concerning the offense charged, and is so connected as to shed light upon one or more of these questions. See 2 N. C. Index 2d, Criminal Law, § 34; also, Stansbury, N. C. Evidence, Brandis Revision, § 92.

In this case the evidence concerning a robbery by defendant and the victim, Lemmons, the failure of defendant to receive any of the money obtained in the robbery, and the evidence that Lemmons was spending a lot of money was competent to show intent and design by defendant to kill Lemmons. It also establishes a chain of circumstances and is so connected with the charge of killing Lemmons so as to throw light upon that charge at trial. *State v. Jenerett,* 281 N.C. 81, 187 S.E. 2d 735 (1972); *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Lassiter,* 16 N.C. App. 377, 192 S.E. 2d 21 (1972), *cert. den.* 282 N.C. 428 (1972). Moreover, we find that the court gave proper limiting instructions to the jury concerning their consideration of the evidence in question.

[2] The witness Dale Newton testified concerning incriminating statements which defendant purportedly made to her. Defendant asserts that the trial court erred in not allowing his objections and motions to strike and suppress this testimony. He contends that at the time he made the statements to Dale Newton he was so intoxicated from liquor and drugs that he was in a state of "mania" and unconscious of the meaning of his words, and that his admissions were therefore inadmissible. We disagree.

Before allowing Dale Newton to testify regarding defendant's incriminating statements the court conducted a voir dire and made findings of fact. There was competent evidence to support the trial court's findings that any drugs and liquor consumed by defendant were voluntarily consumed by him and not furnished by any police or government official, and that any intoxication, if any, of defendant did not amount to mania; and that in his statements to Dale Newton defendant was aware of what he was saying and doing. Since the trial court's findings of fact are supported by competent evidence they are conclusive before this Court. *State v. Simmons,* 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Carey,* 285 N.C. 509, 206 S.E. 2d 222 (1974). The mere fact that defendant was intoxicated at the time he made incriminating statements does not render such statements inadmissible where the intoxication does not amount to "mania." *State v. McClure,* 280 N.C. 288, 185 S.E. 2d 693 (1972); *State v. Logner,* 266 N.C. 238, 145 S.E. 2d 867 (1966); *State v. Oxendine,* 24 N.C. App. 444, 210 S.E. 2d 908 (1975).

[3] Prior to trial defendant requested and received from the District Attorney a list of the State's witnesses. Defendant argues that the name of the witness Crisp was not on the list and therefore Crisp should not have been allowed to testify. He assigns error to the failure of the court to allow his motion to strike the testimony of Crisp. We see no grounds for defendant's position.

The record shows that the trial court offered defendant sufficient time to prepare for the proposed testimony of Crisp, and that defendant was in fact able to obtain two witnesses, prisoners, whose testimony tended to contradict the witness Crisp. Defendant has not shown bad faith on the part of the District Attorney, or any prejudice, in the omission of Crisp's name from the prior list of witnesses. Furthermore, there is no

common law or statutory right which entitles defendant to a list of witnesses who are to testify against him in a criminal case. *See State v. Carter,* 289 N.C. 35, 41, 220 S.E. 2d 313 (1975), and cases cited therein.

[4] Defendant assigns error to the failure of the trial court to instruct the jury on voluntary manslaughter. However, the only evidence argued by defendant in support of an instruction on this lesser included offense was a statement in Dale Newton's testimony that defendant told her that he and Lemmons had gotten into an argument prior to the killing. This evidence is not sufficient to support a charge on voluntary manslaughter. Evidence of an argument, without some evidence of assault or threatened assault, is insufficient to support a charge as to manslaughter. *State v. Watson,* 287 N.C. 147, 214 S.E. 2d 85 (1975).

[5] We are also unconvinced by defendant's argument that the trial court misstated the necessary elements of second degree murder by failing to instruct the jury that malice is an essential element of second degree murder. The jury was instructed that "if the State has satisfied you from the evidence and beyond a reasonable doubt that the defendant inflicted wounds with a deadly weapon on Rudolph Lemmons, Jr., that caused his death and that he did so intentionally, nothing else appearing, that would constitute murder in the second degree." His Honor further instructed "if the State has satisfied you from the evidence and beyond a reasonable doubt that the defendant unlawfully and *with malice* shot and killed the deceased, Rudolph Lemmons, Jr., then it would be your duty to return a verdict of guilty of murder in the second degree." (Emphasis added.) The charge was proper. *State v. Jones,* 287 N.C. 84, 214 S.E. 2d 24 (1975).

Having reviewed all of defendant's assignments of error we hold that defendant received a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. JOHN J. WILSON

No. 7525SC772

(Filed 21 July 1976)

1. Perjury § 1— elements of perjury

The essential elements of the crime of perjury are: a false statement under oath, knowingly, wilfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, as to some matter material to the issue or point in question.

2. Perjury § 3— sufficiency of indictment

Indictment sufficiently set forth the substance of the offense of perjury and conformed in all essential respects with the statutory form set forth in G.S. 15-145.

3. Indictment and Warrant § 13; Perjury § 3— denial of bill of particulars

The court in a perjury case did not abuse its discretion in the denial of defendant's motion for a bill of particulars where the indictment was sufficiently specific to inform defendant as to the statements by which he was alleged to have perjured himself.

4. Criminal Law § 40; Perjury § 4— entire testimony at former trial

In this prosecution for perjury, defendant was not prejudiced by the admission without limitation of the transcript of defendant's entire testimony at the murder trial at which he allegedly committed perjury.

5. Criminal Law § 90; Perjury § 4— testimony not impeachment of State's own witness

In a prosecution of defendant for perjury in a murder trial, testimony by a State's witness that he had himself testified falsely at the murder trial did not violate the general rule against impeachment of one's own witness since the testimony was not introduced for the purpose of impeaching the credibility of the witness but was admitted for the purpose of establishing the falsity of the oath of defendant, who had corroborated the witness's testimony at the former trial.

6. Perjury § 4— competency of testimony

In a prosecution for perjury in a murder trial, a witness's testimony that defendant was not at the place where the murder occurred and that he and defendant had gone over their statements together prior to the murder trial to see how they compared was properly admitted as being within the witness's own knowledge and as having a direct bearing on defendant's alleged false testimony.

7. Perjury § 5— proof of perjury — two witnesses

In a prosecution for perjury it is required that the falsity of the oath be established by the testimony of two witnesses, or by one witness and corroborating circumstances sufficient to turn the scales against the defendant's oath.

8. Perjury § 5— sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for perjury where it tended to show that defendant testified in a murder trial that the accused had been attacked by the victim and another and that the shooting occurred while the accused was trying to defend himself, a witness testified that defendant was not present at the time and place of the shooting and two eyewitnesses to the shooting testified to a course of events diametrically opposed to those described in defendant's sworn testimony.

9. Perjury § 5.5— instructions — materiality of false testimony

The trial court did not err in instructing the jury that allegedly perjured testimony in a murder trial related to significant issues of fact in that trial since the materiality of the testimony assigned as perjury was a question of law for the court.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 17 April 1975 in Superior Court, CALDWELL County. Heard in the Court of Appeals 20 January 1976.

Criminal prosecution for perjury. Defendant was charged in a bill of indictment with committing the felony of perjury on 13 April 1974 at the trial in Superior Court in Caldwell County of one Charles Austin Pearson for first degree murder, "by falsely asserting on oath or solemn affirmation that (1) on or about the 29th day of September, 1973, two men attacked and assaulted Charles Austin Pearson. (2) That Charles Austin Pearson did not attack or assault anyone. (3) That Charles Austin Pearson never went to the car of the deceased William Grantham Morgan," said matter being material to the issue being tried and defendant knowing said statements to be false, "or being ignorant whether or not said statements were true." Defendant pled not guilty.

At the trial the State presented the testimony of the court reporter who had transcribed the testimony given by defendant as a witness at the Pearson trial. The transcript of the testimony of defendant given at that trial was introduced into evidence and was read to the jury. In his testimony given at the Pearson trial defendant testified that on the night of 29 September 1973 he drove his automobile with one Watson as his passenger to the parking lot of the Cedar Rock Country Club and there witnessed a fight between Pearson, Morgan, and one Miller. Defendant described the fight in graphic detail, including a description of how Morgan and Miller struck and hit Pearson, how Pearson tried to get away, and how Pearson

finally managed to get to his car and procure a pistol, which he fired into the air. The picture painted by defendants' testimony at the Pearson trial showed an unprovoked assault upon Pearson by Morgan and Miller to which Pearson responded by trying to defend himself. As defendant described it, the fight took place near the Pearson car and not at the car in which Morgan had been riding.

At defendant's trial for perjury the State presented the testimony of Watson, who testified that at the Pearson murder trial he had sworn falsely that defendant Wilson was with him at the parking lot of the Country Club on the night of the shooting, whereas in fact Wilson was not there. He also testified that he and Wilson had gone over their statements together prior to the Pearson trial to see how they compared. The State also presented the testimony of Miller and one King, who described the events at the parking lot on the night that Morgan was shot and killed. Their testimony showed that Pearson had come to the car in which Morgan was seated, had there pointed a pistol at Morgan and ordered him out of the car, and had subsequently shot Morgan in the back of the head, killing him.

Defendant did not offer any evidence. The jury found defendant guilty of perjury, and from judgment imposing a prison sentence, defendant appealed.

Attorney General Edmisten by Senior Deputy Attorney General R. Bruce White, Jr., Assistant Attorney General Zoro J. Guice, Jr. and Associate Attorney General Guy Hamlin, for the State.

Wilson & Palmer by W. C. Palmer and G. C. Simmons III for defendant appellant.

PARKER, Judge.

Defendant first assigns error to the denial of his motion to quash the indictment. He contends that it lacks "such certainty in the statement of accusation as will identify with particularity the offense sought to be charged." We do not agree.

[1, 2] The essential elements of the crime of perjury, as defined by common law and extended by G.S. 14-209, are substantially these: "a false statement under oath, knowingly, wilfully and designedly made, in a prooceding in a court of competent jurisdiction, or concerning a matter wherein the

affiant is required by law to be sworn, as to some matter material to the issue or point in question." *State v. Smith,* 230 N.C. 198, 201, 52 S.E. 2d 348, 349 (1949). By statute in this State, G.S. 15-145, in an indictment for perjury "it is sufficient to set forth the substance of the offense charged," and the statute prescribes a form of indictment which shall be sufficient. We find that the indictment on which defendant was tried adequately sets forth the substance of the offense charged and that it conforms in all essential respects with the statutory form set forth in G.S. 15-145. Defendant's first assignment of error is overruled.

[3] Defendant next contends that, even if the bill of indictment is valid, the court erred in denying defendant's motion for a bill of particulars. G.S. 15-143, applicable to defendant's trial, provided for the furnishing of further information not required to be set out in the indictment and placed the grant or denial of a motion for such information solely in the discretion of the court. (G.S. 15-143 was repealed by Session Laws 1973, c. 1286, s. 26, effective 1 September 1975; for presently applicable statute, see G.S. 15A-925). The ruling by the court on such a motion is not subject to review except for palpable and gross abuse of discretion. *State v. Lippard,* 223 N.C. 167, 25 S.E. 2d 594 (1943). We find no abuse of discretion in the present case. The bill of indictment is sufficiently specific to inform defendant as to the statements by which he was alleged to have perjured himself. Furthermore, although the bill of indictment was returned approximately nine months previously, defendant did not request a bill of particulars until the day the case was called for trial. Defendant's second assignment of error is overruled.

[4] Defendant contends the court erred in allowing the court reporter from the previous Pearson murder trial to read in its entirety the transcript of defendant's testimony at that trial. Defendant concedes such a transcript would have been admissible in his perjury trial (1) for the limited purpose of identifying the proceedings at which it was alleged he committed perjury and (2) for the determination, by means of reading selected portions of his testimony, of whether he had made such statements and whether such statements were material to the issues of the Pearson case. Defendant asserts, however, that to allow the entire transcript of his testimony to be read without limitation was prejudicial error. We find no error. In *State v. Mann,* 219 N.C. 212, 13 S.E. 2d 247 (1941), introduction of the transcript of testimony given in a former trial was not limited solely

to those portions containing the alleged perjured testimony. Although portions of defendant's testimony at the Pearson murder trial may have been irrelevant to any issue raised at his perjury trial, upon careful examination of the record before us, we find no way in which the admission of such irrelevant material was prejudicial to the defendant.

[5, 6] Defendant makes several assignments of error relating to the testimony given by the witness Watson. We find no merit in any of these. Watson's testimony given on direct examination at defendant's perjury trial, in which he admitted that he had himself testified falsely at the Pearson murder trial, was not admitted in violation of the general rule against impeachment of one's own witness. Such testimony was not introduced by the State for the purpose of impeaching the credibility of Watson but was admitted for the purpose of establishing the falsity of the oath of the defendant, who had corroborated Watson's testimony at the former trial. Defendant's contention that Watson's testimony was irrelevant and inflammatory is likewise without merit. Such testimony bore directly on the issue of defendant's alleged perjury. Defendant's objection to Watson's testimony that defendant was not at the Country Club parking lot on the night in question cannot be upheld. This clearly related to a matter within Watson's own knowledge concerning which he was competent to testify. Similarly, testimony by Watson both concerning conversations held by him with defendant Wilson prior to the Pearson murder trial to discuss testimony to be given by them at the Pearson trial and concerning who directed him to falsify his evidence was properly admitted as being within Watson's own knowledge and as having a direct bearing on defendant's alleged false testimony.

[7, 8] Defendant assigns error to the court's denial of his motion for nonsuit. Considering the evidence in the light most favorable to the State and giving the State every reasonable inference from the evidence presented, we find the evidence amply sufficient to warrant submission of the case to the jury. In a prosecution for perjury it is required that the falsity of the oath be established by the testimony of two witnesses, or by one witness and corroborating circumstances sufficient to turn the scales against the defendant's oath. *State v. Sailor,* 240 N.C. 113, 81 S.E. 2d 191 (1954). Here, the State presented the testimony of Watson that defendant was not present at the scene and therefore could not have testified truthfully concern-

ing the events which under oath he so vividly described at the Pearson trial. Corroborating this was the testimony of Miller and King, who were eyewitnesses at the scene, and who testified to a course of events diametrically opposed to those described in defendant's sworn testimony at the Pearson trial, including especially his testimony concerning the matters alleged in the bill of indictment. There was no error in denying the motion for nonsuit.

[9] Defendant contends the court erred in the following portion of the charge, relating to the element of "materiality" of the defendant's alleged perjured testimony, in which the court instructed the jury that to find defendant guilty of perjury:

> " . . . the State must prove that the testimony was material; that is, that it tended to mislead the jury in regard to a significant issue of fact. Whether Charles Austin Pearson on September 29, 1973, was attacked or assaulted by two men; that Charles Austin Pearson did not assault or attack anyone; and that Charles Austin Pearson did not go to the automobile of W. G. Morgan was (sic) significant issues of fact in the Charles Austin Pearson trial."

Defendant asserts the effect of this charge was to instruct the jury peremptorily that the alleged false statements were, in fact, material to an issue of fact in the Pearson trial, thus invading the province of the jury on an issue of fact. We find no error. Although we have found no decision of our own Supreme Court on this point, "[t]he rule established in almost all jurisdictions in which the point has been in any way passed upon is that on a trial for perjury the question of the materiality of the alleged false testimony is in its nature a question of law for the court rather than of fact for the jury." Annot., 62 A.L.R. 2d 1027; 60 Am. Jur. 2d. Perjury § 11. Although some of the decisions adhering to this rule recognize that in a given instance the evidence may be such that the issue of materiality becomes a fixed question of law and fact to be submitted to the jury under appropriate instructions, we do not find that to be so in the present case. Here, the materiality of the testimony assigned as perjury was clearly a question of law for the court.

In defendant's trial and in the judgment appealed from we find

No error.

Judges HEDRICK and ARNOLD concur.

SUITT CONSTRUCTION COMPANY, INC., KORBLER DEVELOPMENT CORP., LARRY L. BRITTAIN, P. PEYTON WARLEY, NELL C. KORBLER, KENNETH L. MARTIN, G. FRANK KORBLER, NELL JOY COOK, GLORIA ANN TIMBERLAKE, BETTY LOU HARTIS, WILLIAM JOSEPH KORBLER, ROBERT FRANK BOERKEOL, GENERAL PARTNERS D/B/A HILL HAVEN DEVELOPERS, NORTH CAROLINA LIMITED PARTNERSHIP AND COLWICK DEVELOPMENT CORPORATION, A NORTH CAROLINA CORPORATION v. THE SEAMAN'S BANK FOR SAVINGS AND FIRST UNION NATIONAL BANK OF NORTH CAROLINA

No. 7626SC198

(Filed 21 July 1976)

1. **Courts § 21— making of contract — place of last act determines where contract made**

A loan commitment agreement between the parties had as its primary object the proposed loan from defendant to plaintiffs, not the construction of an apartment complex for which the loan was obtained; therefore, the place at which the last act was done by either of the parties essential to a meeting of the minds determined the place where the contract was made.

2. **Courts § 21— last act constituting contract occurring in N. Y. — N. Y. law applicable**

Receipt by defendant in N. Y., on or before 16 March 1973, of the signed acceptance by plaintiff and other documents mentioned in the loan commitment agreement constituted the last act essential to the parties' meeting of the minds; therefore, N. Y. law should be applied in determinng the validity of the contract.

3. **Courts § 21; Damages § 7— standby fee in loan commitment — N. Y. law applicable**

In an action under the Declaratory Judgment Act seeking to have a provision in a loan commitment agreement declared an invalid and unenforceable penalty clause, the trial court properly applied the rule followed by the N. Y. appellate courts upholding and enforcing the standby fee contained in a loan commitment as liquidated damages or as consideration for the commitment.

APPEAL by plaintiff from *Snepp, Judge*. Judgment entered 17 November 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 June 1976.

This is an action under the Declaratory Judgment Act, G.S. 1-253 et seq., asking that a provision in a loan commitment agreement be declared an invalid and unenforceable penalty clause, and that plaintiffs recover $70,000 plus interest from defendant The Seaman's Bank for Savings (hereinafter referred to as defendant Seaman's).

The complaint alleges in pertinent part:

Plaintiffs, except Colwick Development Corporation (Colwick), are partners doing business as Hill Haven Developers (Hill Haven). Colwick is a "dummy" North Carolina corporation which defendant Seaman's required Hill Haven to set up to execute the agreement in question on behalf of Hill Haven. Defendant Seaman's is a New York banking corporation with principal office in New York City. Plaintiff Hill Haven is a North Carolina limited partnership, organized to acquire and construct an apartment complex to be known as "Woodwinds," in Charlotte, N. C.

On or about 5 March 1973 defendant Seaman's offered to lend Hill Haven $3,500,000, the loan to be secured by first mortgage on certain real estate in Charlotte. The loan was to be consummated pursuant to the terms set forth in defendant Seaman's commitment letter dated 5 March 1973. The letter is made a part of the complaint and contains the following pertinent provisions:

> "10. Deposit: The borrower deposits in New York with this Bank, the sum of $70,000 (an irrevocable unconditional Letter of Credit, to run 30 days beyond the below closing date, drawn by a Bank approved by us and payable at a New York City bank, will be acceptable) to be held in New York by this Bank as security for liquidated damages, which sum shall be retained by this Bank in the event that for any reason, other than the default of this Bank under its commitment, the loan does not close on September 16, 1974, or earlier at this Bank's option, or as extended by this Bank in writing. The deposit will be returned when and if the loan closes pursuant to this agreement. This provision for liquidated damages is inserted herein, in view of the difficulty of establishing the damages of this Bank in the event this loan should not close under such circumstances.

"11. A non-refundable commitment fee, in the amount of $35,000 is to be paid to this Bank, in New York, at the time of acceptance of this Commitment Letter."

Pursuant to paragraph 11 of the commitment agreement, Hill Haven paid to defendant Seaman's the sum of $35,000 at the time of acceptance of the agreement. Pursuant to paragraph 10 of the agreement, Hill Haven has deposited with defendant Seaman's the sum of $70,000 in the form of an irrevocable letter of credit drawn by defendant First Union National Bank (First Union) and payable to defendant Seaman's.

The said sum of $70,000 is denominated in said paragraph 10 of the commitment agreement as "security for liquidated damages"; and the agreement states that said sum will be retained by defendant Seaman's in the event that for any reason, other than the default of defendant Seaman's, the loan is not closed on 16 September 1974. (By amendment the date was changed to 21 March 1975.)

The $70,000 was not related in any manner to the probable actual damages that would be suffered by defendant Seaman's in the event of a breach of the agreement. The denomination of the sum as liquidated damages did not result from a good faith effort by the parties to establish in advance the actual damages that would ensue in case of a breach, but was arbitrarily adopted by defendant Seaman's and forced upon plaintiffs as a condition of the loan. Any damages accruing to defendant Seaman's are readily ascertainable.

Because of unprecedented inflationary factors, as well as financial uncertainty within the construction industry, plaintiffs have been unable to undertake construction of the proposed apartments, therefore, they will be unable to complete their construction by 21 March 1975.

On information and belief plaintiffs allege that defendant Seaman's has invested the funds allocated to the aforesaid commitment in short term securities at a rate of return substantially in excess of the rate of return set forth in the commitment letter; that defendant Seaman's will suffer no actual damages from breach of the agreement; in fact, it will profit from a breach for the reason that it will be able to loan the $3,500,000 promised to plaintiffs at a substantially higher interest rate than that set forth in the commitment letter.

Plaintiffs asked that the $70,000 payment be declared a penalty and to be void and unenforceable under North Carolina law; and that defendant First Union be enjoined from paying to defendant Seaman's, and defendant Seaman's be enjoined from demanding payment of, the $70,000.

By an amendment to the complaint, plaintiffs alleged that defendant First Union had paid the $70,000 to defendant Seaman's, therefore, they asked for judgment against defendant Seaman's in that amount.

Defendants filed answer after which plaintiffs and defendants moved for summary judgment.

In its answers to interrogatories, admissions, etc., defendant admitted that plaintiffs paid it $35,000 as a nonrefundable commitment fee; that plaintiffs and defendant Seaman's did not discuss or negotiate concerning the amount of actual damage said defendant would suffer if the loan was not closed; and that on the date of breach defendant Seaman's could have loaned the funds at a greater interest rate than provided in the commitment agreement. However, defendant Seaman's explained that actual damages could not accurately be ascertained on the date of the commitment because it could not predict the future state of the money market and had to keep available the amount committed as part of its cash flow which precluded it from investing the funds elsewhere.

Plaintiffs also submitted in support of their motion for summary judgment admissions by defendant Seaman's that it had suffered no actual damage as a result of plaintiffs' failure to close the loan; that defendant Seaman's damage could be accurately ascertained on the date of breach; that the sum stipulated as "liquidated damages" was unilaterally arrived at by defendant Seaman's; and that it would suffer no actual damage if it loaned the funds committed to plaintiffs to a third party at an interest rate equal to or in excess of that specified in the commitment letter.

Following a hearing, the trial court granted defendant's motion for summary judgment and plaintiffs appealed. Further pertinent facts are set forth in the opinion.

DeLaney, Millette, DeArmon & McKnight, P.A., by Ernest S. DeLaney, Jr., and Ernest S. DeLaney III, for plaintiff appellant.

Smith, Anderson, Blount & Mitchell, by John L. Jernigan, for defendant appellee.

BRITT, Judge.

Plaintiffs contend that North Carolina law is applicable to the contract in question and that under the law of this State summary judgment in favor of defendants was not proper.

[1] First, plaintiffs argue that the agreement was executed in Charlotte and was to be performed in that city. With respect to performance, plaintiffs insist that the construction of the apartment complex was the "thing to be performed" and the general rule is that the law of the place of performance applies. While we agree with plaintiffs as to this rule of law, we cannot agree that the primary object of the agreement was the construction of the apartment complex. We hold that the proposed loan from defendant Seaman's to plaintiffs was the primary object.

We agree with plaintiffs that this jurisdiction follows the general rule that the validity and construction of a contract are to be determined by the law of the place where the contract is made. *Davis v. Davis,* 269 N.C. 120, 152 S.E. 2d 306 (1967), and cases therein cited. Our Supreme Court has also held that the place at which the last act was done by either of the parties essential to a meeting of the minds determines the place where the contract was made. *Fast v. Gulley,* 271 N.C. 208, 155 S.E. 2d 507 (1967), and cases therein cited.

Plaintiffs argue that the agreement was prepared and signed by defendant Seaman's in New York after which it was mailed to plaintiffs in Charlotte; that on 14 March 1973 officials of Colwick signed an approval and acceptance of the agreement and returned it by mail to defendant Seaman's; that this was the last act done essential to a meeting of the minds, therefore, North Carolina law became applicable.

[2] We do not find plaintiffs' argument persuasive. The closing paragraph of the agreement, which is in the form of a letter, reads as follows:

> "This Bank agrees to hold the above offer open until Friday, March 16, 1973. If acceptance of the above terms

and conditions has not been indicated by the borrower signing *and the receipt by us in New York* of the enclosed green copy of this letter, and the enclosed authorization for title search, together with the borrower's corporate check to our order, in the amount of $35,000, representing the non-refundable commitment fee and a similar check or Letter of Credit, in the amount of $70,000, representing the security deposit, on or before that date, this offer will be considered null and void." (Emphasis ours.)

We think the receipt by defendant Seaman's in New York, on or before 16 March 1973, of the signed acceptance by Colwick and the other documents above mentioned constituted the last act essential to the meeting of the minds, thereby making application of New York law proper in determining the validity of the contract. *See, e.g.*, A. Ehrenzweig, Conflict of Laws §§ 176, 194 (1962); *Kossick v. United Fruit Co.*, 365 U.S. 731, 6 L.Ed. 2d 56, 81 S.Ct. 886 (1961), *rehearing denied*, 366 U.S. 941, 6 L.Ed. 2d 852, 81 S.Ct. 1657 (1961).

[3] It appears that the New York appellate courts have followed the rule adopted by several other jurisdictions upholding and enforcing the standby fee contained in a loan commitment as liquidated damages or as consideration for the commitment, and have rejected the contention that these charges are unenforceable penalties. *See Boston Road Shopping Center, Inc. v. Teachers Insurance and Annuity Assoc.*, 13 App. Div. 2d 106, 213 N.Y.S. 2d 522 (1961), *aff'd*, 11 N.Y. 2d 831, 227 N.Y.S. 2d 444, 182 N.E. 2d 116 (1962), *motion for reargument denied*, 11 N.Y. 2d 1064, 230 N.Y.S. 2d 1026 (1962).

For cases from other jurisdictions that apparently have followed the rule, *see: Shel-Al Corporation v. American National Insurance Co.*, 492 F. 2d 87 (5th Cir. 1974); *White Lakes Shopping Center, Inc. v. Jefferson Standard Life Insurance Company*, 208 Kan. 121, 490 P. 2d 609 (1970); *Goldman v. Connecticut General Life Insurance Company*, 251 Md. 575, 248 A. 2d 154 (1968); *Regional Enterprises, Inc. v. Teachers Ins. and Annuity Ass'n*, 352 F. 2d 768 (9th Cir. 1965); and *Continental Assurance Co. v. Van Cleve Bldg. & Constr. Co.*, 260 S.W. 2d 319 (Mo. App. 1953).

For the reasons stated, the judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge MORRIS concur.

JERRY W. WHITTEN v. BOB KING'S AMC/JEEP, INC. AND R. L. KING, JR.

No. 7621SC125

(Filed 21 July 1976)

1. **Corporations § 25— contract in excess of president's authority — corporation not liable**

In an action on a contract purportedly made for a corporation by its president, summary judgment was properly entered on behalf of the corporation where the corporation established that its president had no authority to make the contract and plaintiff offered nothing of substance to show that the president did have such authority.

2. **Contracts § 12— ambiguous contract — construction — genuine issue of material fact**

A genuine issue of material fact was raised as to whether a written contract constituted a loan or an agreement to convey stock when issued where the terms of the agreement were ambiguous, and extrinsic evidence relating to the agreement was competent to clarify its terms.

3. **Corporations §§ 8, 25; Principal and Agent § 11— contract in excess of authority — liability of corporate president**

A corporate president who exceeded his actual authority in executing a contract with plaintiff is personally responsible to plaintiff unless he is absolved of such liability by a contract provision stating, "This holds no responsibility over [the corporate president] individually but only to the Corporation," and a genuine issue of material fact was raised as to the meaning and effect of such provision.

APPEAL by plaintiff from *Seay, Judge.* Judgment entered 17 November 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 14 May 1976.

In this action plaintiff seeks to recover the value of certain stock in defendant corporation, or, alternatively, to compel transfer of capital stock in the corporation. The complaint, filed 14 February 1975, alleges in pertinent part:

On or about 4 November 1968 plaintiff and the corporate defendant, acting through its president, defendant King, entered into a written contract in words and form as follows:

LETTER

To Whom it may concern:

This is to verify that Jerry W. Whitten did invest five thousand dollars in Triangle Motor Sales Inc. This money

was loaned to R. L. King, Jr. until such time as stock could be issued in the company which will be after American Motor Sales Corp. has been bought out. This money & any or all interest at 6% annually or dividends which would be due if this stock were in effect at present time. This to be based on a percentage of the capital which was used to start operation of Triangle Motor Sales Inc. May 1968. The interest or dividends will be used to purchase further interest in the company if Mr. Whitten so desires. This holds no responsibility over Mr. King personally but only to the Corporation of Triangle Motor Sales Inc.

s/ R. L. KING, JR.
Pres.
Triangle Motor Sales Inc.

(Defendant corporation is a successor to Triangle Motor Sales, Inc.)

In August of 1974 payment of the initial loan from American Sales Corporation to the corporate defendant was completed. At that time plaintiff made demand on defendants to issue him his stock certificate representing his interest in defendant corporation but defendants have failed and refused to issue the certificate. The net worth of defendant corporation is approximately $380,000; the initial capital investment in the corporation was $20,000, $5,000 of which was paid by plaintiff, thereby entitling him to a one-fourth interest in defendant corporation. Plaintiff has demanded that defendants pay him $95,000, the value of his one-fourth interest, but defendants have failed and refused to do so. He asks for monetary judgment against defendants for $95,000 or, in the alternative, that defendants be required to convey to him one-fourth of the corporate stock in defendant corporation.

In an amendment to the complaint, plaintiff alleges an additional alternative cause of action summarized in pertinent part as follows: At the time he executed the written contract above set out, defendant King represented to plaintiff that he was president of the corporate defendant's predecessor and had authority to bind the corporate defendant. Plaintiff is now informed and believes that defendant King exceeded his authority in entering into the contract thereby rendering him personally responsible for carrying out the terms of the contract. Plaintiff renews the prayer for relief set out in the original complaint.

Defendants filed separate answers. In its answer the corporate defendant asserted that the purported contract is only a memorandum of a loan by plaintiff to defendant King and is legally insufficient as a stock agreement; however, should it be determined that the writing is a contract, corporate defendant is not bound by it because defendant King acted outside the scope of his authority and plaintiff had full knowledge of such lack of authority. In his answer, defendant King denies personal liability in view of the specific provision of the alleged contract.

Defendants filed motions for summary judgment. They also filed an affidavit of defendant King stating that neither he nor corporate defendant had ever entered into a stock purchase agreement with plaintiff; that the transaction was a loan to corporate defendant; that it was his and plaintiff's intention that defendant King would not be personally liable on the loan; that corporate defendant is not liable because at the time the loan was made corporate defendant was controlled by American Motors, defendant King owned no voting stock in corporate defendant, had no authority to obligate corporate defendant for the issuance of stock, and plaintiff had full knowledge of his lack of authority.

Plaintiff filed an affidavit stating that defendant King advised him at the time of the transaction that plaintiff would be issued stock as soon as American Motors was paid off; that he (plaintiff) borrowed the $5,000 at ten percent interest, thereby indicating that he had never considered the transaction a mere loan bearing six percent interest.

On deposition plaintiff testified that in 1968 defendant King was attempting to purchase a franchise from American Motors who required him to put up $20,000 in order to obtain a $100,000 loan; that at King's invitation, plaintiff invested $5,000 of the required $20,000 but had to be a silent partner because American Motors wanted King to be the sole owner; that King drafted the letter agreement; and that King had the authority to enter into a contract as envisioned in the letter and to do whatever else he wanted to since the business was his.

Defendant King testified on deposition that in 1968 he was president of corporate defendant but American Motors held all the voting stock and he owned only some nonvoting stock; that he had a board of directors to answer to at that time and had no authority to obligate corporate defendant; that since the

loan to American Motors was paid off in 1974 he now owns all of the voting stock of corporate defendant; that corporate defendant's net worth is now $175,000; and that he drafted the letter agreement.

The court granted defendants' motions for summary judgment and from judgment dismissing the action, plaintiff appeals.

Henry C. Frenck for plaintiff appellant.

White and Crumpler, by Fred G. Crumpler, Jr., G. Edgar Parker, and Michael J. Lewis, for defendant appellees.

BRITT, Judge.

By his sole assignment of error plaintiff contends the trial court erred in entering summary judgment in favor of defendants. We agree with the trial court with respect to the corporate defendant but hold that the court erred in entering summary judgment in favor of defendant King.

Summary judgment is appropriate ". . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). In ruling on a motion for summary judgment, the court does not resolve issues of fact and must deny the motion if there is any genuine issue of materal fact. *Singleton v. Stewart,* 280 N.C. 460, 186 S.E. 2d 400 (1972). The party moving for summary judgment has the burden of establishing the lack of a genuine issue of material fact, and the papers supporting the movant's position are closely scrutinized while the opposing papers are indulgently treated. *Van Poole v. Messer,* 19 N.C. App. 70, 198 S.E. 2d 106 (1973); *Miller v. Snipes,* 12 N.C. App. 342, 183 S.E. 2d 270 (1971), *cert. denied,* 279 N.C. 619, 184 S.E. 2d 883 (1971).

[1] When the stated principles are applied to the case at bar, we think the corporate defendant clearly established that as to it defendant King had no authority to make the alleged contract, and plaintiff offered nothing of substance to show that he did have that authority. Therefore, we hold that entry of summary judgment in favor of corporate defendant was proper. However,

application of the same principles lead us to a different conclusion with respect to defendant King.

To say that the alleged written contract is unclear and ambiguous would be an understatement. It begins by saying that plaintiff was *investing* $5,000 in the corporation headed by defendant King. It then states that money was "loaned" to defendant King but in the same sentence refers to the issuance of stock. The succeeding three sentences appear to relate to stock in the corporation and the amount of stock that plaintiff would be entitled to receive.

In 2 Strong, N. C. Index 2d, Contracts § 12, pp. 311-12, we find: "Where the language of a contract is plain and unambiguous the construction of the agreement is a matter of law for the court, and a patent defect or omission cannot be cured by matters outside the instrument. However, if the contract terms are ambiguous, extrinsic evidence relating to the agreement may be competent to clarify its terms, and to have its meaning ascertained by the jury under proper instructions by the court."

[2] Plaintiff contends that under his agreement with defendant he is entitled to stock in defendant corporation for his $5,000; defendant King contends that the $5,000 was a loan. Due to the ambiguity of the written contract, we hold that a genuine issue of material fact is raised and extrinsic evidence relating to the agreement would be competent to clarify its terms.

[3] That brings us to the question of defendant King's liability. In 19 Am. Jur. 2d, Corporations § 1348, p. 752, we find: "The general rule of agency—that one who undertakes to act without authority or who exceeds the authority actually delegated to him is personally responsible to the person with whom he is dealing—is applicable to unauthorized contracts entered into by officers and agents of corporation. . . . "

The stated rule applies here unless the last sentence in the alleged contract absolves defendant King of all liability. That sentence reads: " . . . This holds no responsibility over Mr. King personally but only to the Corporation of Triangle Motor Sales Inc."

We think the meaning of the quoted sentence is ambiguous and raises another issue of material fact should the jury first

determine that the transaction constituted an agreement to convey stock and not a loan. Considered in the context of the overall transaction, and particularly the indication that plaintiff was "investing" $5,000 in the corporation, the sentence is capable of the construction that its purpose was to insure that plaintiff would not expect defendant King, individually, to repay the $5,000 should the investment prove unsound.

We have not attempted to suggest all issues that might arise in the trial of this action. We have merely pointed out two genuine issues of material fact that appear from the materials presented at the hearing on defendants' motions for summary judgment.

For the reasons stated, the judgment with respect to corporate defendant is affirmed. As to defendant King, the judgment is vacated and the cause is remanded for further proceedings consistent with this opinion.

Judgment vacated and cause remanded.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. LEE ROY MARTIN

No. 7618SC208

(Filed 21 July 1976)

1. **Criminal Law § 11— accessory after the fact — elements of crime**

To constitute a person an accessory after the fact these essentials must appear: (1) the felony must have been committed; (2) the accused must know that the felony has been committed by the person received, relieved or assisted; (3) the accessory must render assistance to the felon personally. G.S. 14-7.

2. **Criminal Law § 11— accessory after the fact — failure of defendant to aid principal felon — crime complete irrespective of success**

In a prosecution of defendant for being an accessory after the fact to the felony of manslaughter where the State offered evidence tending to show that the felony of manslaughter had been committed, that defendant knew the slayer had committed the felony, and that defendant undertook to assist the slayer in concealing the crime and avoiding arrest by first planning to dispose of the victim's body and, secondly, preparing a written statement for the slayer's signature which indicated that the gun used in the crime belonged to the

victim and the victim shot himself, the fact that defendant was unsuccessful in his efforts was immaterial, since, clearly, his design was to help the principal felon evade the law; in like manner defendant's motive in trying to conceal the fact that he, as a convicted felon, was in possession of the pistol did not excuse his actions in endeavoring to assist the principal felon in evading arrest and prosecution.

3. Criminal Law § 11— principal felon guilty of involuntary manslaughter — defendant guilty of accessory after the fact to voluntary manslaughter — no error

The trial court properly denied defendant's motion in arrest of judgment made on the ground that defendant was convicted of the felony of accessory after the fact to voluntary manslaughter but the principal felon was convicted only of involuntary manslaughter, since if defendant was an accessory after the fact to manslaughter, voluntary or involuntary, he would be guilty of a substantive felony under G.S. 14-7.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 19 December 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 10 June 1976.

Defendant was charged in a bill of indictment with the felony of being an accessory after the fact to the felony of manslaughter.

The State's evidence tends to show the following: On 16 April 1975 defendant, Jeffery Scott, Delbert James Moorefield (the slayer), and John Olin Whitworth (the victim) were riding in defendant's automobile from place to place in Guilford County, drinking beer. Defendant was driving, Scott was in the rear seat on the left, Whitworth (the victim) was in the right front seat, and Moorefield (the slayer) was in the right rear seat immediately behind Whitworth. As they rode along, the four were teasing and "picking at" one another. Whitworth took a pistol from the glove compartment and brandished it about in the car saying, "I have got the gun now." Moorefield grabbed the gun and said, "Who's got the gun now?" The pistol fired, and the projectile struck Whitworth in the left forehead, exited from the right back of his head, and penetrated the right front windshield. Whitworth slumped over in the front seat, apparently dead. The shooting took place between five and five thirty o'clock p.m.

Defendant told Moorefield, "He is dead as Hell, boy, you have killed him." Defendant then told Moorefield and Scott, "Don't panic, that is the worst thing to do. The first thing to

do is get rid of the body." Defendant then proposed that they gas up the car, take the body to Tennessee and dump it somewhere. Defendant told them, "Don't panic, we have got to get rid of the body." When Moorefield and Scott objected to that course of action, defendant told them that the gun was his, that he was a convicted felon, that he was not supposed to have a gun, that he was not going to prison because of something someone else had done, and that he wasn't going to let anybody know he had a gun.

Defendant kept riding and talking. Scott suggested that they take the victim to the hospital, but defendant said, "No, he is sure enough dead." Defendant finally drove to the home of Randal Scott (the brother of defendant's passenger). Defendant said to Randal Scott, "You know I want to take his body and dump it out and if the law should get onto me will you go along with me." Randal Scott told defendant to take the victim to the hospital. On the way to the hospital defendant stopped and purchased a quart bottle of beer, which he drank. On the way to the hospital defendant told Scott and Moorefield that they would report that the victim shot himself and everybody would stick to that story. Defendant told Scott and Moorefield, "Hey, boy, if you crack and get me in trouble, I have got a friend at the prison camp, I will get even with you." Defendant further threatened reprisals against the families of Scott and Moorefield if the police found out anything that happened and "if you tell on me."

Defendant arrived at the hospital at approximately 7:02 p.m., some one and one-half to two hours after the shooting took place. The police asked that defendant, Scott, and Moorefield each write out a statement of what happened. Moorefield told them he could not write and asked defendant to write it for him. Defendant wrote a statement which Moorefield signed. The statement indicated that the gun belonged to the victim and that the victim shot himself. Moorefield first told the officers that he and the victim had purchased the gun, that he did not know the victim had carried the gun with him that day. Later Moorefield told the officers that the gun belonged to defendant and also told them that he had leaned forward, grabbed the gun, and while in his hand, it went off as he was sitting back down in the back seat.

Defendant offered no evidence. The jury found defendant guilty as charged.

Attorney General Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.

Morgan, Byerly, Post, Herring & Keziah, by W. B. Byerly, Jr., for the defendant.

BROCK, Chief Judge.

Defendant assigns as error the denial of his motion for judgment of nonsuit.

[1] "At common law, an accessory after the fact is one who, knowing that a felony has been committed by another, receives, relieves, comforts, or assists the felon, or in any manner aids him to escape arrest or punishment." 21 Am. Jur. 2d, Criminal Law, § 126, p. 200. This same definition is applicable to our statute, which reads: "If any person shall become an accessory after the fact to any felony . . . such person shall be guilty of a felony. . . . " G.S. 14-7. "To constitute a person an accessory after the fact these essentials must appear: (1) The felony must have been committed. (2) The accused must know that the felony has been committed by the person received, relieved or assisted. (3) The accessory must render assistance to the felon personally." *State v. Potter,* 221 N.C. 153, 19 S.E. 2d 257 (1942).

[2] It seems clear in this case that the State offered evidence tending to show (1) that the felony of manslaughter had been committed; (2) that defendant knew that Moorefield had committed the felony; and (3) that defendant undertook to assist Moorefield in concealing the crime and avoiding arrest by first planning to dispose of the victim's body and, secondly, by preparing a written statement for Moorefield's signature, which indicated that the gun belonged to the victim and that the victim shot himself. We think the fact that defendant was unsuccessful in his efforts is immaterial because clearly his design was to help the principal felon evade the law. "It is not necessary that the aid be effective to enable the felon to escape all or a part of his punishment." 22 C.J.S., Criminal Law, § 99, p. 277. In a like manner defendant's motive in trying to conceal the fact that he, as a convicted felon, was in possession of the pistol does not excuse his actions in endeavoring to assist the principal felon in evading arrest and prosecution.

Defendant strenuously argues that a statement made in *State v. Potter, supra,* entitles him to a dismissal of the charges against him because his actions were primarily for the advantage of himself and not for the principal felon. The statement in *Potter* is a quote from American Jurisprudence. It reads as follows: "Where . . . the concealment of knowledge of the fact that a crime has been committed, or the giving of false testimony as to the facts is made for the purpose of giving some advantage to the perpetrator of the crime, *not on account of fear, and for the fact of the advantage to the accused,* the person rendering such aid is an accessory after the fact." (Emphasis added.) 14 Am. Jur., Criminal Law, § 103, p. 837.

There are several reasons why defendant's reliance upon the above quote is ill founded. First, the principle above-quoted is applicable to situations where a person *merely fails to give information* of the committed felony or *denies knowledge* of the committed felony. This is made clear by the sentence in the text which immediately precedes the one quoted. Secondly, *Potter* was not concerned with that type of concealment of knowledge of a felony, and the second two sentences quoted from the American Jurisprudence text were not essential to the disposition of the case before the court. Thirdly, we have researched the source material for the quoted sentence from American Jurisprudence, i.e., *Blakely v. State,* 24 Tex. App. 616, 7 S.W. 233, 5 Am. St. Rep. 912 (1888), and 19 Ann. Cas. 144. The American Jurisprudence text is a direct quote from the annotation in 19 Ann. Cas. 144, which, in turn, cites as its authority *Blakely v. State, supra.* A reading of *Blakely* discloses that it holds that two witnesses to a murder who were coerced by a third witness to the murder to give false information to a magistrate were accomplices of the third witness as an accessory after the fact. In so holding, the court stated: "In agreeing to do so, and in doing so, no matter what the motive, they made themselves accomplices, or *particeps criminis* in the offense which was committed [the felony of accessory after the fact] by their false testimony. If a witness implicates himself, it is immaterial that he claims to have been coerced." *Blakely v. State, supra.* It therefore seems clear that *Blakely* does not support the cited text. Furthermore, the current text of American Jurisprudence has deleted the sentence relied upon by defendant. *See* 21 Am. Jur. 2d, Criminal Law, § 126. Likewise, the text of Corpus Juris Secundum does not support

defendant's argument. *See* 22 C.J.S., Criminal Law, §§ 95-99. And finally, the meaning of the sentence relied on by defendant is unclear and susceptible of various constructions. In our view this argument by defendant is without merit.

[3] After the verdict of the jury was returned in this case, the principal felon pleaded guilty to the felony of involuntary manslaughter. Defendant moved in arrest of judgment, arguing that defendant was convicted of the felony of accessory after the fact to *voluntary* manslaughter but that the principal felon was convicted only of *involuntary* manslaughter. This argument is not persuasive.

The offense of being an accessory after the fact to a felony is a substantive felony offense. *State v. McIntosh,* 260 N.C. 749, 133 S.E. 2d 652 (1963). Manslaughter, whether voluntary or involuntary, is a felony. *State v. Swinney,* 271 N.C. 130, 155 S.E. 2d 545 (1967). The trial judge explained the elements of both voluntary and involuntary manslaughter, as he should have done, because if defendant was an accessory after the fact to either one, he would be guilty of a substantive felony under G.S. 14-7. The trial judge did not submit an issue of accessory after the fact to involuntary manslaughter as a lesser included offense of the offense charged. He explained the elements of both voluntary and involuntary manslaughter and instructed the jury that if it found that the State had established either crime beyond a reasonable doubt, then the requirement of showing that the crime of manslaughter had been committed would be satisfied. We perceive this to be a correct application of the law. The question of punishment was for determination by the trial judge under G.S. 14-2, as in the case of other felonies for which no specific punishment is prescribed by statute.

We have examined defendant's remaining assignments of error and find them to be without merit. In our opinion defendant had a fair trial free from prejudicial error.

No error.

Judges PARKER and ARNOLD concur.

FIRST NATIONAL BANK OF SHELBY, PLAINTIFF v. GENERAL FUNDING CORPORATION, GARL W. SWAIM AND WIFE, NETTIE ALMA SWAIM, DEFENDANTS, AND DELORES ANN KLOUSE; FREDIQUE MENDEZ; KENNETH M. POWELL; NORMAN LENORA ROSAS; HERBERT WEBER; BERNARD ELROD; KENT B. YEAGER; WALTER B. WILLIAMS; JOHN V. WATTLES; TOWN HOUSE OF LANCASTER, A CORPORATION; STEPHEN S. STEVENS; L. H. ROWELL; CLYDE T. MORGAN; BILLY MORGAN; PHILLIP R. McMANUS; DR. R. H. JAMES; PRINCE HINSON; HENRY M. GOBIE; THOMAS G. GAMBLE; ARLENE FUTRELL; H. W. CANNON; HOYT C. BURNETT, JR.; ROBERT M. CHASON; JOHN E. BRICK; NED GREGORY; R. L. BLACKMON; ESTHER B. ARNETTE; JAMES C. PEARSON; ROBERT L. McCANN; THOMAS H. MAXWELL, JR.; CLARENCE A. TAYLOR; ALFRED A. LANE; MARBEL A. GOVERNOR; LENORE GILBERT; HOMER FORSTER; MICHAEL P. CHASE, P.A.; GENE A. STOKES; VAN L. HOBBS; ALFRED T. HEATH; JAMES M. FOXWORTH; ROBERT E. DUNN; EMMETT W. BRUNSON, JR., ADDITIONAL PARTY DEFENDANTS

No. 7627SC195

(Filed 21 July 1976)

Process § 9— nonresident defendants — notes executed in another state — no in personam jurisdiction

The nonresident third party defendants did not have sufficient minimum contacts with this State to subject them to *in personam* jurisdiction by the courts of this State in an action involving promissory notes where the third party defendants executed in Florida the notes which were payable to a limited partnership in Florida, the notes were subsequently assigned by the Florida partnership to a bank in this State without the prior knowledge or approval of the makers, and the only contacts the third party defendants had with this State were when they mailed payments from Florida to the bank in this State. G.S. 1-75.4.

APPEAL by additional defendants, John E. Brick, James C. Pearson and Robert L. McCann from *Falls, Judge.* Judgment entered 26 November 1975, Superior Court, CLEVELAND County. Heard in the Court of Appeals 8 June 1976.

The action sought to recover an alleged balance due the plaintiff by the defendants in the amount of $239,191.67 together with reasonable attorneys' fees which was a result of an alleged default in payment on a loan made by the plaintiff to the defendant, General Funding Corporation, which was allegedly guaranteed by the codefendants, Garl W. Swaim and wife, Nettie Alma Swaim. In addition to the alleged guarantee

by the individual codefendants, the plaintiff allegedly received as security for the loan to the defendant, General Funding Corporation, the assignment of certain other promissory notes held by the said defendant, General Funding Corporation, which had been assigned to General Funding Corporation by a Florida limited partnership.

The defendants, General Funding Corporation and Garl W. Swaim and wife, Nettie Alma Swaim, filed an answer to the plaintiff's Complaint on 17 September 1975, moving for dismissal of the plaintiff's Complaint, alleging negligence on the part of the plaintiff as a bar to any recovery by it against them, and included a pleading denominated a cross action which sought to join numerous other parties as additional party defendants, which were not originally named in the Complaint of the plaintiff, but who were the original makers and issuers of the promissory notes which the defendant, General Funding Corporation, had assigned to the plaintiff as security for its loan. The basis for the impleader or third-party action was that those certain additional party defendants and makers of the promissory notes had defaulted on the payments of those notes and were in turn indebted to the original defendant, General Funding Corporation, in a collective amount of $241,647.27.

Several of the additional party defendants, including the appellants herein, filed motions that the impleader or third-party action be dismissed because the court lacked *in personam* jurisdiction over the additional party defendants.

After hearing, the trial court entered its order retaining *in personam* jurisdiction over all of the additional party defendants including the appellants, from which order the additional party defendant appellants Robert L. McCann, John E. Brick, and James C. Pearson appealed.

Jones, Jones & Key, P.A., by James U. Downs for additional party defendant appellants.

No Counsel contra.

CLARK, Judge.

Does the Due Process Clause of the Fourteenth Amendment, Constitution of the United States, preclude a North Carolina court from obtaining jurisdiction over the person of the Addi-

tional Party Defendants who reside in and were served with process in the State of Florida by registered mail under G.S. 1-75.4?

In support of their motion to dismiss, the appealing Additional Party Defendants filed affidavits which revealed uncontradicted facts, as follows:

The Additional Party Defendants executed promissory notes on or about August, September and November of 1973, made payment to Kar-Kare Owners Group of Florida, Ltd., and in each case, the promissory notes represented a portion of the purchase price of five (5) units of limited partnership interest in the said Kar-Kare Owners Group of Florida, Ltd., which was a Florida limited partnership. Those promissory notes were apparently assigned to the defendant, General Funding Corporation, which was a North Carolina corporation doing business in the State of Florida, and subsequently assigned by the defendant, General Funding Corporation, to the plaintiff. The First National Bank of Shelby, as additional security for the loan referred to hereinabove. None of the Additional Party Defendants had ever done any business in the State of North Carolina, did not maintain any offices, bank accounts, mailing addresses, telephone listings or other business or personal facilities in the State of North Carolina, did not own any property in the State of North Carolina and did not place any advertising in any publications for the benefit of their businesses in the State. The entire transaction of execution and delivery of the promissory notes took place and was fully accomplished in the State of Florida, and the initial transaction was consummated between residents of Florida and a business entity organized under the laws of the State of Florida, namely, Kar-Kare Owners Group of Florida, Ltd. The subsequent assignments of the promissory notes by the said Kar-Kare Owners Group of Florida, Ltd., took place without the consent, approval, or knowledge, of any of the Additional Party Defendants; however, they were informed by the First National Bank of Shelby, plaintiff herein, that their notes had eventually been assigned to it, and some payments were made by each of the Additional Party Defendants which were made by check issued in the State of Florida, in each case, and mailed from the State of Florida to said Bank. At no time did any of the Additional Party Defendants personally appear in the State of North Carolina and commence or complete any phase of the entire transaction which

began with their initial issuance of the promissory notes and which ended with the ultimate assignment of the notes to plaintiff Bank.

The Supreme Court of the United States has limited the power of the state courts to obtain personal service against persons outside the state since *Pennoyer v. Neff,* 95 U.S. 714, 24 L.Ed. 565 (1878). Since the *Pennoyer* decision the court, in a continuing process of evolution, has accepted and then abandoned "consent," "doing business," and "presence" as the standards for measuring the extent of state judicial power over such persons and corporations. Generally, the states have kept pace with statutes based on these standards. Then in *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945), the court held that "due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain *minimum contacts* with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " 326 U.S. at 316 (Emphasis added).

In North Carolina the "long arm" statute G.S. 1-75.1, et seq., provides for *in personam* jurisdiction by the courts of this State pursuant to G.S. 1A-1, Rule 4(j), Rules of Civil Procedure, where the nonresident party, individual or corporation, has specified contacts within the State. These "statutory provisions are a legislative attempt to assert *in personam* jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause of the United States Constitution." *Trust Co. v. McDaniel,* 18 N.C. App. 644, 197 S.E. 2d 556 (1973).

In the Trust Co. case, *supra,* plaintiff bank required that the officers of a local corporation endorse a note for the corporation to obtain a loan. Upon default in payment plaintiff bank brought suit on the endorsement of the officers, one of them residing in New Jersey and being served in that State. The court held that where the nonresident defendant promises to pay the debt of another, which debt is owed to North Carolina creditors, such promise is a contract to be performed in North Carolina and is sufficient minimal contact upon which this State may assert personal jurisdiction over the defendant under G.S. 1-75.4(5)(a).

But in the case before us the Additional Party Defendants executed in the State of Florida the promissory notes which

were payable to a limited partnership in that State. These notes were subsequently assigned by the Florida partnership to a North Carolina corporation, and this assignment was made without the prior knowledge or approval of the makers and was not subject to their control. Though the appealing Additional Party Defendants admitted making payments by mail from the State of Florida to the plaintiff Bank in this State such payments were not sufficient minimum contacts to subject them to *in personam* jurisdiction of the trial court in this State.

While the provisions of the North Carolina "long arm" statute are to be liberally construed in favor of finding personal jurisdiction, we cannot expand the permissible scope of state jurisdiction over nonresident parties beyond due process limitations. The mere mailing of a payment from outside the State by a nonresident to a party in this State under a contract made outside the State is not sufficient "contacts" within this State to sustain *in personam* jurisdiction in the forum State. See *Andrews Associates v. Sodibar Systems*, 28 N.C. App. 663, 222 S.E. 2d 922 (1976); Anno., 20 A.L.R. 3d 1201 (1968).

The order of the trial court is

Reversed and this cause remanded.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. EUSTER CLAY RAINES

No. 7610SC151

(Filed 21 July 1976)

1. **Criminal Law § 75— incriminating statements — officer's admonition to tell the truth**

On officer's statement to defendant that "it would be better for him to tell the truth" was not an inducement or promise or reward which rendered defendant's subsequent incriminating statements inadmissible in evidence.

2. **Criminal Law § 75— request for attorney — subsequent waiver of attorney — admissibility of confession**

Defendant's incriminating statements were not inadmissible because he initially indicated he wanted an attorney where officers terminated all questioning of defendant when he stated that he wanted

an attorney, defendant was allowed to talk with his mother and sister and was informed that robbery victims had identified him, defendant then told officers he wanted to make a statement, defendant was informed of his constitutional rights and signed a written waiver of those rights, and defendant then made the incriminating statements to officers.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 26 November 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 26 May 1976.

The defendant, Euster Clay Raines, was charged in separate indictments, proper in form, with the armed robbery of Constant L. Horton on 24 September 1975, the armed robbery of Richard Sampson on 8 June 1975, and the armed robbery of Latha Whittington on 14 June 1975. Prior to trial, pursuant to G.S. 15A-975, defendant moved to suppress certain incriminating statements made by him to the police. He also moved to dismiss the charges against him, pursuant to G.S. 15A-954, alleging that "[t]he defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution."

Defendant's motions came on for a hearing before Judge Bailey on 25 November 1975, after which he made findings and conclusions and entered an order allowing defendant's motion to suppress in part but denying defendant's motion to dismiss. On 2 December 1975 the defendant appeared for trial and entered pleas of "no contest" to the three armed robbery charges. Defendant's pleas were accepted by the court. The three charges were consolidated for judgment. From judgment entered that he be imprisoned for twenty-five to thirty years, defendant appealed.

Attorney General Edmisten by Associate Attorney Richard L. Griffin for the State.

Manning, Fulton & Skinner by Howard E. Manning, Jr., for defendant appellant.

HEDRICK, Judge.

The defendant assigns as error that portion of the order denying his motion to suppress.

The material facts of this case offered into evidence at the hearing on defendant's motions are not in dispute. Constant Horton was accompanying two police officers, who were driving on the streets of Raleigh on 24 September 1975, when he made an on-the-street identification of defendant as being the person who had robbed him. The defendant was arrested and taken to the investigative division of the police department. He was interviewed by Detective G. S. Black who fully advised him of his rights. The defendant stated that he desired an attorney, whereupon the interview was terminated and the defendant was taken to the Wake County Magistrate's Office and booked.

The defendant's mother and his sister met Detective Black and the defendant at the Magistrate's office, and defendant's mother requested that she be allowed to talk with the defendant. She went with defendant into a room adjacent to the "booking room." Approximately ten minutes later, she came to the door and asked what her son was charged with. Detective Black explained the charges to her and she advised her son to tell the truth. Black also "advised him at that time that it would be better for him to tell the truth." Black then left them alone again.

While defendant's mother continued talking with defendant, two people who had been robbed in the "Church's Chicken robbery" were shown a picture lineup. Each made a positive identification of defendant as the perpetrator. Detective Black re-entered the room where the defendant and his mother were talking and informed them that he had been identified by the victims of the robbery. He asked the defendant "if he wished to talk" and defendant responded "that he would like a minute to think about it."

The defendant's sister was allowed to talk with defendant. Five or ten minutes later, the defendant informed Detective Black that he wished to make a statement. The defendant was taken, alone, to the Sheriff's Department and interviewed. He was advised of his rights and signed a written waiver in the presence of Detectives Black and Jones. Defendant indicated that he understood his rights. He appeared to be normal in all respects. There were no threats or promises made, and he agreed to talk without a lawyer present. He then proceeded to make a statement which was written down by Black and Jones and signed by the defendant. The interview was completed at 5:12 p.m.

Later that evening Detective Jones talked with defendant's sister at her home. He told her "that him [the defendant] being truthful with us [the police] could possibly help him in court." Subsequent to the twenty-fourth, the defendant's sister talked with the defendant; and subsequent to the twenty-fourth, defendant had several more conversations with the police where he made incriminating statements.

On these facts, Judge Bailey concluded that there was no violation of defendant's constitutional rights prior to 5:12 p.m. on 24 September 1975. He also concluded, however, that the statement by Detective Jones to defendant's sister was "improper"—that it "was such as the officer knew or should have known would be communicated to Raines by his relatives." Based on this conclusion, he entered an order that any statements prior to 5:12 p.m., 24 September, were admissible into evidence but that all subsequent statements by the defendant were inadmissible.

Defendant contends on appeal that the facts offered into evidence at the hearing demonstrate that he was denied the right to counsel in violation of his Sixth Amendment rights and that he was "illegally compelled, through inducement and a suggestion of hope, to make incriminating statements," in violation of his Fifth Amendment rights. Since statements made subsequent to 24 September were suppressed, we consider defendant's contentions only as they apply to the statement made on 24 September.

[1] With regard to defendant's claim that he was denied his Fifth Amendment right to remain silent, he argues that Detective Black's statement to the defendant that "it would be better for him to tell the truth" was an inducement or a promise of reward which compelled him to make the incriminating statement. If a statement is "obtained by the slightest emotions of hope or fear," it should be rejected. *State v. Roberts,* 12 N.C. 259, 260 (1827). Thus, where defendant was told it would be "better for him in court" *(State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968)), or "to make an honest confession. It might be easier for you . . . " *(State v. Drake,* 113 N.C. 625, 18 S.E. 166 (1893)), or "it would be lighter on [him]" *(State v. Livingston,* 202 N.C. 809, 164 S.E. 337 (1932)), the subsequent confession has been excluded, because, in each instance, the defendant was offered hope, reward, or inducement that he

would benefit from the police or the court by telling the truth. Nothing in those cases, however, proscribes general "custodial admonitions to an accused by police officers to tell the truth." *State v. Pruitt,* 286 N.C. 442, 458, 212 S.E. 2d 92, 102 (1975). In *State v. Thompson,* 227 N.C. 19, 40 S.E. 2d 620 (1946) (cited with approval in *Pruitt, supra),* the officers told defendant, "it would be better to go on and tell us the truth than try to lie about it." The admission of the confession in that case was upheld.

We believe that the language in the instant case falls within the language of *Thompson.* The circumstances which existed when the statement was made in no sense were coersive. Defendant was with his mother; he was not even being questioned by police at the time. Black's statement was nothing more than a general custodial admonition to tell the truth. The trial court correctly concluded there was no Fifth Amendment violation in regard to the 24 September statement.

[2] With regard to defendant's claim that the procedure above violated his Sixth Amendment right to counsel, the U. S. Supreme Court in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), said the following:

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to the police, they must respect his decision to remain silent."

Defendant contends that *Miranda* prescribes a blanket prohibition against further communication by the police with the defendant, until the defendant has consulted with an attorney.

In the present case, when defendant indicated he wanted an attorney, the police respected his request and promptly terminated all questioning. It was on the defendant's own initiative that Detective Black talked with the defendant again. Before talking with defendant, Black read and explained to him his rights under the Constitution, including his right to have an attorney present. Defendant waived those rights, signing the written waiver presented to him by Black.

The presence of counsel in an in-custody police interrogation is designed to insure "that statements made in the government-established atmosphere are not the product of compulsion," *Miranda, supra.* This insurance was never meant to be absolute, however, in proscribing the use of confessions *per se. Miranda* requires that the police respect the Constitutional rights of the defendant in obtaining custodial statements from the defendant. "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently," *Miranda, supra.* We can find nothing in *Miranda,* and have been cited to no subsequent case by defendant, which implies that once defendant has indicated he wishes to exercise his right to an attorney he may not voluntarily make a subsequent informed and intelligent waiver of that right. *See Michigan v. Mosley,* 46 L.Ed. 2d 313 (1975) (Subsequent interrogation and resulting confession were upheld after defendant initially asserted his Fifth Amendment right to remain silent.).

> "[A] blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigation activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." *Mosley, id.,* at 46 L.Ed. 2d 320.

We conclude that the defendant in this case did voluntarily, knowingly and intelligently waive his rights to counsel on 24 September before making the statement which he sought to have suppressed. The trial court's denial of defendant's motion to suppress the 24 September statement is affirmed.

The judgment appealed from is affirmed.

Affirmed.

Judges PARKER and ARNOLD concur.

BLANCHE C. CRITCHER v. DEWEY CALVIN OGBURN, EXECUTOR OF THE ESTATE OF ZELMA JAMES OGBURN

No. 7610DC204

(Filed 21 July 1976)

1. **Contracts § 25; Quasi-Contracts § 2— express and implied contract plead — evidence supporting both — both submitted to jury**

Where the complaint pleads both an express contract and an implied contract and there is evidence to support both theories, issues should be submitted to the jury as to both.

2. **Executors and Administrators § 24; Contracts § 27— services rendered decedent — express contract — sufficiency of evidence**

In an action to recover upon an express contract evidence was sufficient to be submitted to the jury where it tended to show that plaintiff and her sister agreed that the latter would move into the home of the former, they would share expenses, the sister would pay plaintiff $50 per month rent in addition to sharing the expenses, and none of the $50 per month rent was paid by the sister prior to her death.

3. **Executors and Administrators § 24— services provided decedent — recovery upon implied contract**

Should the jury find that there was no express contract between plaintiff and her sister relative to the latter's occupancy of the home, the evidence is sufficient to raise an inference that plaintiff provided for her sister a useful service in allowing her to occupy plaintiff's home, such service was of a character that is usually charged for, the sister availed herself of such service, and evidence was given as to the reasonable value of the service rendered and received.

APPEAL by plaintiff from *Murray, Judge.* Judgment entered 19 January 1976 in District Court, WAKE County. Heard in the Court of Appeals 9 June 1976.

This is a civil action wherein the plaintiff, Blanche C. Critcher (Blanche), seeks to recover from Dewey Calvin Ogburn, Executor of the Estate of plaintiff's deceased sister Zelma James Ogburn (Zelma), $1,700.00 upon the theory of express or implied contract.

Plaintiff's complaint is briefly summarized as follows:

In one count, plaintiff alleged that Zelma Critcher, sister of the plaintiff, resided with plaintiff in her home from 11 September 1971 until 25 July 1974 when she died. Zelma agreed with plaintiff to pay $50.00 per month as rent for living in the house but never paid anything up until her death. Plaintiff has

demanded payment from the defendant, Executor, in accordance with North Carolina law but her demands have been refused. There is justly owing to plaintiff $1,700.00 for rent.

In a second count, incorporating the above allegations, she alleged that she had rendered valuable services to Zelma in providing a home for her and that she was entitled to recover the reasonable value thereof. She alleged that the reasonable value was $50.00 per month and that $1,700.00 was justly owing to plaintiff.

The defendant filed answer denying that the Estate was indebted to plaintiff in any amount. He admitted that Zelma moved in with plaintiff on 11 September 1971, lived with plaintiff and occupied a room in her house until her death, but alleged that this occurred pursuant to an understanding between Zelma and plaintiff that they would share utility and food expenses. Defendant alleged that Zelma had fully performed under the agreement until the time of her death.

From a directed verdict in favor of defendant, plaintiff appealed.

Johnson, Gamble and Shearon by Samuel H. Johnson for plaintiff appellant.

Douglass and Barham by Clyde A. Douglass II for defendant appellee.

HEDRICK, Judge.

The evidence offered at trial tended to show the following:

Blanche Critcher owns a home where she has resided since 1963 at 518 Hilltop Avenue, Garner, North Carolina (Hilltop). On 11 September 1971 her sister, Zelma, moved from her home at Willow Springs, North Carolina, and began residing with Blanche at Hilltop. She resided with Blanche until she died on 25 July 1974. When she moved to Hilltop, she brought with her a bedroom suite, a couple of living room chairs and a color television set. Annie Tarlton, a sister of Blanche and Zelma, visited them once or twice a week at Hilltop and talked with them almost every day on the phone. She testified in part as follows:

"I had occasion to discuss with [Zelma] her arrangement for sharing or paying or whatever she did concerning her

occupancy. Almost immediately after she moved she and I talked about it and she said they were going to split half of the utilities and groceries and half of the expenses, she called it, then she was going to pay Sister, Mrs. Critcher, a lump sum when Mrs. Critcher retired. The lump sum was for staying there for letting her use part of her house."

Blanche retired in June 1974.

Raymond Critcher, Blanche's son, who lives in Garner, testified that he had been in the insurance business, insuring homes, and had "placed true values on homes." He testified that Blanche paid $13,500.00 for the house in 1963; that improvements had been made on the home; that its fair market value from 1970 to 1974 was at least $22,000.00; and that under the circumstances where the sister shared utilities and food, where Zelma brought some of her own furniture, and where Zelma, as a sister, would occupy one bedroom in the house, the fair rental value of the room and the joint occupancy of the house was $50.00 per month. The house beside Blanche's is comparable to hers and is rented for $160.00 per month.

Joseph Jones Card, Jr., who lives in Maryland, is a brother of Blanche and Zelma. He has been a long distance truck driver for eighteen years and has had occasion to keep in close contact with Blanche and Zelma. He testified in part as follows:

"I would usually call them twice every month and would see them almost twice a month. I would call my sister, Mrs. Zelma Ogburn, when she lived on the farm, and I would go by and see my sister, Mrs. Blanche Critcher, and then when Zelma moved in with Blanche, I would see them both at the same place, at Hilltop Avenue in Garner. My sister, Blanche Critcher, owns that home, and Mrs. Ogburn moved in with Mrs. Critcher approximately September of 1971. I saw Mrs. Ogburn the week before she moved and I saw them again on Thanksgiving weekend with the whole family. Since 1971, I have seen Mrs. Critcher and Mrs. Ogburn once or twice a month, and I know that Mrs. Ogburn resided at Blanche Critcher's house after September 1971. Mrs. Ogburn visited with me frequently, at least two or three times a year, and would stay sometimes a week, and sometimes more than that, at my home near Baltimore. I had occasion to inquire as to the financial relationship or the sharing relationship and matters of expenses at the

Critcher house, and while sitting around the table drinking coffee with Zelma, I asked her what kind of deal she worked out with Blanche, and she told me. Zelma Ogburn told me she'd pay half of the utilities and $50.00 per month. I had discussions from time to time with Mrs. Ogburn and she told me that the $50.00 per month was for room rent and sharing the house. The arrangement for food was to split the cost. I discussed with Mrs. Ogburn the circumstances as to how she was to pay the rent and she told me that she would pay a little now and then, whenever Blanche needed it, until she retired, and when she retired she would straighten up with her and they would do things together. I had a lot of conversations with my sister, Blanche [Zelma], and the last conversation with her was when she was in the hospital, and as of that time I do not know if she had paid any of the rent. I don't think we discussed that thoroughly. The last time I discussed the rent with my sister was the previous summer when we were on vacation together. As of that time she said she had not paid any of it. She said that as of that time Blanche didn't need it and didn't want it. I am referring to the summer of 1973. She indicated she expected to pay Blanche, and she was very serious about it. It is my understanding that they had entered into this type of agreement with each other."

[1] "Where the complaint pleads both an express contract and an implied contract and there is evidence to support both theories, issues should be submitted to the jury as to both." *Helicopter Corp. v. Realty Co.*, 263 N.C. 139, 148, 139 S.E. 2d 362, 369 (1964).

"In the absence of anything to indicate a contrary intention of the parties, where one performs for another a useful service of a character that is usually charged for and such service is rendered with knowledge and approval of the recipient, who either expresses no dissent or avails himself of the service rendered, the law raises an implied promise on the part of the recipient to pay the reasonable value of such service. The general rule is that where services are rendered by one person for another, and are knowingly and voluntarily accepted, without more, the law presumes that such services were given and received in the expectation of being paid for, and implies a promise to pay

their reasonable worth." 66 Am. Jur. 2d, Restitution and Implied Contracts, § 24, p. 968.

See Freight Carriers v. Allen Co., 22 N.C. App. 442, 206 S.E. 2d 750 (1974).

[2] The complaint in the present case pleads both an express and an implied contract; and in our opinion, the evidence, when considered in the light most favorable to the plaintiff, supports both theories. The evidence will permit, but not compel, the jury to find that Blanche and Zelma agreed that the latter would move into the home of the former and they would share expenses and that Zelma would pay Blanche $50.00 per month rent in addition to sharing the expenses. The evidence will support a finding by the jury that none of the $50.00 per month rent was paid by Zelma prior to her death. Indeed, there is no suggestion in defendant's answer or in the evidence that any rent was paid by Zelma. Payment is an affirmative defense which must be pled, G.S. 1A-1, Rule 8(c), and " 'the general rule is that the burden of showing payment must be assumed by the party interposing it.' (Citations omitted.)" *Finance Co. v. McDonald*, 249 N.C. 72, 105 S.E. 2d 193 (1958). Defendant's entire contention seems to be that there was no agreement, either express or implied, that Zelma would pay Blanche for her occupancy of the home.

[3] If the jury should find that there was no express contract between Blanche and Zelma relative to the latter's occupancy of the home, the evidence, when considered in the light most favorable to plaintiff, is sufficient to raise an inference that Blanche provided for Zelma a useful service in allowing her sister to occupy her home; that such service was of a character that is usually charged for; and that Zelma availed herself of such service. Likewise, the evidence is sufficient to raise inferences as to the reasonable value of the service rendered and received.

Since there must be a new trial, it is not necessary that we discuss other questions raised in appellant's brief. The judgment directing a verdict for defendant is reversed and the cause is remanded to the district court for a new trial.

Reversed and remanded.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. RONALD F. JACKSON

No. 7620SC205

(Filed 21 July 1976)

1. **Witnesses § 10— out-of-state alibi witnesses — limitation**

The trial court did not abuse its discretion in limiting its order for the production of out-of-state alibi witnesses to five witnesses where the court found as a fact that all eleven witnesses desired by defendant would testify to substantially the same thing and the credibility of the five witnesses was not attacked by the State.

2. **Criminal Law § 15; Jury § 2— change of venue — special venire — pretrial publicity**

The trial court did not err in the denial of defendant's motion for a change of venue or for a special venire on the ground of local prejudice because of pretrial publicity. G.S. 15A-957.

3. **Criminal Law § 40— deceased witness — testimony at former trial**

The trial court in a third trial of defendant for armed robbery properly admitted the transcript of the victim's testimony at a previous trial where the victim had died and defendant was present and represented by counsel at the previous trial, notwithstanding an additional charge of armed robbery of a second victim was consolidated for trial with the original charge at the third trial.

4. **Criminal Law §§ 66, 178— identification testimony — law of the case**

Supreme Court determination upon appeal after defendant's second trial for armed robbery that the victim's identification of defendant was admissible in evidence became the law of the case at defendant's third trial upon the same charge where the evidence relating to identification was the same at both of those trials.

5. **Criminal Law § 119— requests for instructions — form and time**

The trial court properly refused to give a special instruction requested by defendant where the request was not in writing and was not made before the court's charge to the jury was begun. G.S. 1-181.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 22 October 1975, Superior Court, UNION County. Heard in the Court of Appeals 9 June 1976.

Defendant was charged in 1973 with the armed robbery of Bill Squires. In the first trial defendant appealed from a guilty verdict. This Court in 19 N.C. App. 370, 199 S.E. 2d 32 (1973), granted defendant a new trial. Once again, in the second trial, defendant was found guilty and on appeal this Court (24 N.C. App. 394, 210 S.E. 2d 876 (1975)), found no error. On appeal to the North Carolina Supreme Court (287 N.C. 470, 215 S.E.

2d 123 (1975)), that court ordered a new trial. In the third trial, a charge of armed robbery of William Larry Catledge was added to the Squires' charge and both charges were consolidated for this third trial. The facts of this case have been exhaustively set forth in the prior opinions of this Court and the Supreme Court. Briefly summarized they are that defendant and another man robbed Squires' store; that defendant had a gun and demanded money; that Catledge was also present in the store and the two men robbed him also; that the defendant and accomplice left in a green Chevrolet truck with South Carolina license plates.

Defendant's evidence tends to show by way of alibi that he was in Bennettsville, South Carolina, at the time of the robbery. Additional facts pertinent to the case will be handled in the opinion.

From a verdict of guilty and sentence to prison, defendant appeals.

Attorney General Edmisten by Assistant Attorney General Ralf F. Haskell for the State.

James E. Griffin and Charles D. Humphries for defendant appellant.

CLARK, Judge.

[1] Defendant assigns as error the trial court's order for the production of out-of-state witnesses where the defendant was not allowed to compel attendance of witnesses in addition to five alibi witnesses from Bennettsville, South Carolina. Defendant concedes that a trial court should limit the attendance and compulsion of witnesses when they reach a cumulative state and become repetitious, but he contends that the witnesses that he wanted to call were more credible than the ones which he actually called. The record on appeal discloses that the credibility of defendant's five out-of-state alibi witnesses was not attacked by the State, and further there was no proof by defendant that the testimony of these additional witnesses would be other than cumulative. In limiting the number of witnesses the trial judge found as a fact that all eleven witnesses would testify to substantially the same thing.

We reiterate the ruling of this Court that a trial judge may limit the number of witnesses when the testimony becomes

cumulative. See *State v. Jackson,* 19 N.C. App. 370, 199 S.E. 2d 32 (1973). Defendant has failed to show abuse of the trial judge's discretion in this matter, and this assignment of error is overruled.

[2] Defendant next assigns error in the denial of his motion for a change of venue or for a special venire. Much of the basis for this argument rests in newspaper articles printed prior to this third trial. This same question was raised in defendant's appeal to the North Carolina Supreme Court following the second trial, and the court found that there was no prejudicial publicity and in fact that the publicity generally favored the defendant. *State v. Jackson,* 287 N.C. 470, 215 S.E. 2d 123 (1975). The only additional items of publicity relied on by defendant was a newspaper article and a "spot" on a television news broadcast both appearing in June 1975.

The evidence offered by defendant in the voir dire hearing tended to show that the newspaper article of June 1975 appearing in a Union County newspaper was confined primarily to a history of prior proceedings, and that the "spot" newscast from a Charlotte television station, also in June 1975, was critical of law enforcement officers in Union County for their handling of the case. The trial court found that defendant had failed to show that defendant was prejudiced by this publicity and denied the motion for change of venue.

A motion for change of venue or for a special venire on the grounds of local prejudice because of pretrial publicity is addressed to the sole discretion of the trial judge and a manifest abuse of discretion must be shown before there is any error. *State v. Boyd,* 20 N.C. App. 475, 201 S.E. 2d 512 (1974). Under the Criminal Procedure Act, effective 1 September 1975, G.S. 15A-957, the trial court is required to order a change of venue or special venire if "the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial." The trial court did not make such determination, and since defendant has failed to show abuse of discretion, this assignment of error is overruled.

[3] Defendant next assigns error to the allowance of the reading of the testimony of Bill Squires which had been given at a previous trial. Testimony of a witness at a former trial is admissible if the following conditions are satisfied.

1. Witness must be unavailable to testify. (Squires is dead.)

2. The former trial must have been of the same cause, or a preliminary stage of the same cause, or the trial of another cause involving the issue and subject matter to which his testimony is directed at the current trial.

3. Defendant must have been present and represented by counsel at the former trial. (He was.) See 1 Stansbury, N. C. Evidence 2d (Brandis Rev. 1973), § 145.

The fact that the additional charge of armed robbery of Larry Catledge was consolidated for trial with the charge of armed robbery of Bill Squires does not render the transcript of the testimony inadmissible. Both charges arose out of the same occurrence, and Catledge testified for the State at both this trial and in the former trial and in both trials was cross-examined by counsel for defendant. We find no error in the admission of the transcript of Bill Squires' testimony in the prior trial.

[4] Defendant further assigns as error the failure of the trial court to make findings of fact on *voir dire* in this trial regarding the previous identification of defendant by Bill Squires and thereupon holding that the Supreme Court's prior decision on the matter was *res judicata*. Technically, *res judicata* is not the proper doctrine on which to base the decision. "Law of the case" is the applicable doctrine in this situation where an issue has been decided at a previous trial of the same cause, the decision appealed, the particular issue affirmed by the appellate court, but the cause is for another reason remanded for a new trial. If the issue has been decided by the appellate court, the trial court upon retrial is bound by that decision, the "law of the case." If the evidence relating to identification is *substantially* the same as that at the previous trial, then "law of the case" applies. *State v. Wright*, 275 N.C. 242, 166 S.E. 2d 681 (1969). The Supreme Court having ruled on appeal after the second trial (287 N.C. 470, 215 S.E. 2d 123 (1975)), that the finding of the trial judge was based upon competent evidence and the evidence in this trial being the same, the law of the case applies to this trial. This assignment of error is without merit.

[5] In his remaining assignment of error, other assignments having been abandoned, defendant attacks the failure of the

trial court to give his requested instruction limiting the transcribed testimony of Bill Squires to the charge of armed robbery of Squires and not to the charge of armed robbery of Catledge. It appears that defendant requested no limiting instructions when the Squires transcript of testimony was admitted in evidence; that the requested instruction was not in writing and was orally made at the conclusion of the charge but before the court directed the jury to retire; that at the former trial involving the same occurrence defendant had the opportunity to and did cross-examine the witness Squires at the former trial; and that defendant relied on alibi as his defense.

G.S. 1-181 requires that requests for special instructions be submitted in writing and submitted before the judge's charge to the jury is begun. See *State v. Ervin,* 26 N.C. App. 328, 215 S.E. 2d 845 (1975). The trial court properly refused to give the requested instructions. Further, we find no prejudicial error in failing to limit the transcribed testimony.

No error.

Judges VAUGHN and MARTIN concur.

PIEDMONT EQUIPMENT COMPANY, INC. v. P. ERNEST WEANT, JR. AND AUTOHARDWARE, INC.

No. 7526SC1013

(Filed 21 July 1976)

1. **Appeal and Error § 6; Contempt of Court § 8— indirect civil contempt — appellate review of order dismissing**

Appeal lies to review an order dismissing a charge of indirect civil contempt where the order affects a substantial right claimed by the appellant. G.S. 1-277(a).

2. **Contempt of Court § 8— consent judgment — compliance with terms — no contempt**

The trial court properly denied plaintiff's motion that defendants be found guilty of contempt for intentionally and wilfully disobeying a consent judgment requiring that defendants cease using plaintiff's product numbering system in their catalog or elsewhere and that defendants show none of plaintiff's work products in their catalog or elsewhere, since the judgment was intended to be prospective in its application, defendants were not prohibited by the

judgment from filling orders received as a result of their then outstanding catalogs, and defendants printed within a reasonable time a new catalog in which none of the product identification numbers or work products of plaintiff appeared.

APPEAL by plaintiff from *Snepp, Judge.* Order entered 19 September 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 April 1976.

On 28 September 1973 plaintiff filed its complaint in this action in which it alleged that the individual defendant, a former employee of the plaintiff, had wrongfully misappropriated and used the plaintiff's customer list and product identification numbering system for his own benefit and for the benefit of the corporate defendant, which had been formed by him after the termination of his employment with the plaintiff and of which he was the President and the controlling stockholder. Plaintiff asked for damages and for injunctive relief. Defendants answered and denied the material allegations of the complaint.

During the course of the trial a compromise was effected, and on 23 June 1975 a consent judgment was entered which adjudged as follows:

> "that the defendants, P. Ernest Weant, Jr. and Autohardware, Inc., and each of them, shall cease and desist and shall not hereafter make any use whatsoever in any catalog, document or other instrument or in any other manner, means or medium whatsoever of product identification numbers originated by the plaintiff and known as plaintiff's product numbering system, nor shall defendants reproduce in any catalog, document or other instrument or in any other manner, means or medium whatsoever any work-product of the plaintiff which does or shall hereafter appear in plaintiff's catalog or in any other promotional material of the plaintiff;
>
> IT IS FURTHER ORDERED, by consent, that except as herein expressly provided, that the plaintiff have and recover nothing further of the defendants and this shall be with prejudice."

On 28 August 1975 plaintiff, alleging that defendants had intentionally and wilfully disobeyed the judgment entered 23 June 1975, filed a motion for an order directing defendants to appear and show cause why they should not be found guilty of

contempt of Court and punished accordingly. A show cause order was issued, pursuant to which a hearing was held at which plaintiff presented evidence in the form of sworn testimony and documentary exhibits. Following this hearing the Court entered its order dated 19 September 1975 making findings of fact, including the following:

> "2. That by agreement between the parties, defendants were to have sixty days within which to comply with the terms of the Judgment.
>
> 3. That on July 15, 1975, Mr. W. A. Dennis, one of the attorneys for the plaintiff, forwarded to Mr. Charles F. Coira, Jr., attorney for the defendant, a list of material which plaintiff identified as that to be removed from the Autohardware, Inc. catalog.
>
> 4. That subsequent to June 23, 1975, the defendant received orders from customers for parts bearing part numbers included in the list provided by the plaintiff on July 15, 1975, which orders defendants filled.
>
> 5. That on September 5, 1975, defendants completed the printing of a new catalog, which catalog contains none of the numbers or work-product of the plaintiff as contained on the list provided by the plaintiff to the defendants on July 15, 1975.
>
> 6. That approximately eighty (80) of such catalogs have been distributed thus far to defendants' customers and defendants plan to distribute additional copies to their active customers."

Based on its findings of fact, the Court made conclusions of law, including the following:

> "2. The Consent Judgment previously entered in this cause on the 23rd day of June, 1975 is in the nature of a permanent injunction, and as such must state with sufficient specificity the act or acts which the defendants are enjoined from performing so that the defendants may have full and complete notice of what conduct on the part of the defendants is specifically prohibited.
>
> 3. The judgment of June 23, 1975, is not sufficiently specific to put the defendants on notice of whether they are

prohibited from performing the acts complained of by the plaintiff.

4. The defendants have not intentionally and wilfully disobeyed the provisions of the Judgment of June 23, 1975 and should not be punished as for contempt."

On these findings and conclusions, the Court ordered and adjudged that "the plaintiff's Motion that the defendants be found guilty of contempt of this Court and punished accordingly be and the same is hereby denied."

From this order, plaintiff appealed.

William H. Booe for plaintiff appellant.

Harkey, Faggart, Coira & Fletcher by Charles F. Coira, Jr. for defendant appellees.

PARKER, Judge.

[1] At the outset we face the question whether appeal lies to review an order dismissing a charge of indirect civil contempt. We hold that it does where, as here, the order affects a substantial right claimed by the appellant. G.S. 1-277(a). Had defendants been adjudged guilty of the contempt charged, they would have had the right to appeal expressly granted by statute, G.S. 5-2. That statute, however, makes no reference to an appeal from an order adjudging an alleged contemnor not guilty, and our attention has been directed to no other statute or case authority of this State which expressly deals with the question. Decisions elsewhere are divided. *See* Annot. 24 A.L.R. 3rd 650, "Appealability of Acquittal from or Dismissal of Charge of Contempt of Court." In the only North Carolina case cited in that Annotation, *Murray v. Berry,* 113 N.C. 46, 18 S.E. 78 (1893), our Supreme Court declined to review the action of the trial court in refusing to attach respondents for contempt. In that case, however, the Court found that the rights which plaintiffs sought to enforce by the contempt proceeding could be more properly determined in a pending civil action brought by respondents to partition land, title to which was in question. In the case now before us, we are aware of no other proceeding by which plaintiff can enforce its rights under the consent judgment dated 23 June 1975 than by the contempt proceedings which plaintiff now seeks to have us review. Since the order denying plaintiff the relief sought clearly affects a substantial

right of the appellant, that is, the right to have the 23 June 1975 judgment enforced, we hold that the present appeal lies by virtue of G.S. 1-277(a). *See* § 7 of Annot., 24 A.L.R. 3d 650, cited *supra.*

[2] Turning to the merits of plaintiff's appeal, we find no error in the order denying the plaintiff's motion that the defendants be found guilty of contempt. "The findings of fact by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence, *Cotton Mill Co. v. Textile Workers Union,* 234 N.C. 545, 67 S.E. 2d 755, and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment." *Roses's Stores v. Tarrytown Center,* 270 N.C. 206, 211, 154 S.E. 2d 313, 317 (1967). Here, the court's findings of fact were supported by competent evidence. These factual findings in turn support the court's conclusion that defendants had not intentionally and wilfully disobeyed the 23 June 1975 judgment and that they should not be punished for contempt. Finding of fact number 4, that subsequent to 23 June 1975 defendant's received and filled orders from customers bearing part numbers included in plaintiff's list, does not compel the conclusion that defendants intentionally violated the 23 June 1975 judgment. That judgment was clearly intended to be prospective in its application. At the time it was entered, the parties knew that there were then outstanding, in the hands of defendants' customers, catalogs theretofore issued by defendants in which plaintiff's product identification numbering system was used. Indeed, that was the very basis of plaintiff's action. Had it been intended by the 23 June 1975 judgment that defendants were prohibited from filling orders received as a result of their then outstanding catalogs, clearer language to accomplish that prohibition should have been employed. We interpret the 23 June 1975 judgment as prohibiting defendants from using plaintiff's product numbering system in any future catalogs and as requiring defendants to act with reasonable diligence in issuing to its customers new catalogs in which none of the product identification numbers or other work product of plaintiff appear. The court's findings of fact indicate that this has been done.

The order appealed from is

Affirmed.

Judges BRITT and CLARK concur.

MILDRED R. BARNES v. WILLIAM E. BARNES

No. 767SC273

(Filed 21 July 1976)

1. **Rules of Civil Procedure § 6— notice of hearing of motion — motion heard at session case calendared for trial**

Notice to defendant of the hearing of plaintiff's motion for summary judgment in accordance with G.S. 1A-1, Rule 6(d) and (e) was not required where the case was calendared for trial at the session the motion was heard. G.S. 1A-1, Rule 7(b)(1).

2. **Husband and Wife § 10— separation agreement — consideration**

A separation agreement was supported by consideration where it was under seal and provided benefits to both parties.

3. **Husband and Wife § 12— separation agreement — failure to show fraud — summary judgment**

The trial court properly entered summary judgment for plaintiff on defendant's cross action to rescind a separation agreement on the ground of fraud where defendant admitted on deposition that he read, signed and understood the separation agreement, defendant's strongest assertion was that he was led to believe that the more agreeable he was the better chance he had of plaintiff coming back to him, and defendant stated that neither plaintiff nor her attorney told him that plaintiff would go back to him if he would sign the agreement.

APPEAL by defendant from judgment of *Tillery, Judge,* entered 31 October 1975 and judgment of *Browning, Judge,* entered 12 November 1975 in Superior Court, WILSON County. Heard in the Court of Appeals 18 June 1976.

Plaintiff instituted these actions for purpose of obtaining an absolute divorce from defendant and to compel him to comply with the provisions of a separation agreement.

On 18 December 1972 plaintiff filed two complaints, one in district court (#2252) and the other in superior court (#2253). In the former she asked for a divorce on the ground of one year's separation. In the latter she sought enforcement of the terms of a separation agreement dated 2 September 1970 and particularly provisions of the agreement granting her the right to possess certain personal property.

Defendant filed answers denying material allegations of both complaints. He also filed a cross action in each case alleging abandonment by plaintiff, execution of the separation agreement solely for the purpose of inducing plaintiff to return home,

and termination of his obligations under the agreement due to plaintiff's institution of the divorce action and her failure to qualify as a dependent spouse.

Plaintiff filed motions for summary judgment on defendant's cross actions in both cases, the motions being supported by an affidavit and a copy of the separation agreement setting forth that the agreement provided that defendant's support obligations would continue after divorce between the parties. She also filed answers denying material allegations of the cross actions.

On 27 March 1973 plaintiff was granted a divorce and defendant was allowed time within which to amend his pleadings. On 29 March 1973 he filed amended cross actions alleging three alternative theories for recision of the separation agreement: (1) fraud, (2) lack of consideration for the provisions allowing plaintiff to possess the personal property in question, and (3) lack of consideration for defendant's agreement to pay plaintiff $1,500 per month, resulting in his being damaged to the extent of $44,500.

Plaintiff's motion to consolidate the two cases in superior court was granted on 12 April 1973. On 1 June 1973 defendant filed replies to plaintiff's motions for summary judgment and an affidavit stating that plaintiff's attorney induced him to sign the separation agreement by leading him to believe that plaintiff would return to him if he did so. On 2 July 1974 Judge Browning denied plaintiff's motions for summary judgment.

On 16 January 1975 plaintiff filed a third complaint (#30) in which she alleged that defendant had ceased making the support payments required by the separation agreement and because thereof was indebted to plaintiff in the sum of $9,000. On 18 March 1975 defendant answered the new action and asserted as a counterclaim the same three theories for recision of the separation agreement set forth in the two pending cross actions.

The causes were calendared for trial at the 29 September 1975 session. On 24 September 1975 plaintiff and defendant were deposed. On 25 September 1975 plaintiff moved for judgment on the pleadings with respect to the cross actions based on lack of consideration; she also moved for summary judgment

in all three cases. By consent the three cases were consolidated for hearing. Following a hearing held during the 29 September 1975 session Judge Tillery entered judgment dismissing the cross actions based on lack of consideration.

Plaintiff's motions for summary judgment were heard at the 10 September 1975 session. Following a hearing, Judge Browning entered judgment allowing plaintiff's motion for summary judgment and ordering defendant to pay $24,000 for support payments then due, plus interests and costs.

Defendant appealed from both judgments.

Narron, Holdford, Babb & Harrison, by William H. Holdford, and Dees, Dees, Smith, Powell & Jarrett, by William A. Dees, Jr., for plaintiff appellee.

Farris, Thomas & Farris, by Robert A. Farris, for defendant appellant.

BRITT, Judge.

[1] Defendant contends the trial court erred in hearing plaintiff's motions during the 29 September 1975 session for the reason that defendant was not given notice as required by G.S. 1A-1, Rule 6(d) and (e). This contention has no merit. As this court held in *Sims v. Trailer Sales Corp.*, 18 N.C. App. 726, 198 S.E. 2d 73 (1973), *cert. denied*, 283 N.C. 754, 198 S.E. 2d 723 (1973), Rule 7(b)(1) is applicable since the cases were calendared for trial at the 29 September session. Furthermore, with respect to the motions for summary judgment, defendant was not prejudiced as no action was taken on them pursuant to the September hearing, another hearing on those motions being held at the 10 November session.

Defendant contends Judge Tillery erred in entering judgment on the pleadings regarding his cross actions based on lack of consideration. This contention has no merit.

The separation agreement was pleaded by reference in defendant's amended cross actions, therefore, the agreement was before the court on the motions for judgment on the pleadings. We think the attack on the agreement for lack of consideration must fail for two reasons.

[2] First, the agreement was under seal, which imports consideration. *Honey Properties, Inc. v. Gastonia*, 252 N.C. 567,

114 S.E. 2d 344 (1960), and cases therein cited. As was said by Chief Justice Pearson in *Harrell v. Watson*, 63 N.C. 454, 456 (1869), and quoted in *Honey Properties*, "[t]he solemn act of sealing and delivering is a *deed, a thing done* which, by the rule of the common law, has full force and effect, without any consideration."

In the second place, a reading of the agreement discloses that it provided benefits to both parties. It is elementary contract law that " . . . any benefit, right, or interest accruing to the promisor, or any forbearance, detriment, or loss suffered or undertaken by the promisee, is sufficient consideration to support a contract. . . ." 2 Strong, N. C. Index 2d, Contracts § 4, pp. 296-7.

Defendant's contention that Judge Browning erred in granting plaintiff's motions for summary judgment likewise has no merit. Summary judgment was appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, showed that there was no genuine issue as to any material fact and that plaintiff was entitled to judgment as a matter of law. G.S. 1A-1, Rule 56.

[3] Defendant's remaining ground for attack on the separation agreement is on the basis of fraud on the part of plaintiff or her attorney. The essential elements of actionable fraud are (1) a definite and specific representation which is materially false, (2) the making of it with knowledge of its falsity or in culpable ignorance of its truth and with fraudulent intent, and (3) reasonable reliance on it by the other party to his deception and damage. *Johnson v. Owens*, 263 N.C. 754, 140 S.E. 2d 311 (1965); *New Bern v. White*, 251 N.C. 65, 110 S.E. 2d 446 (1959).

The record is completely devoid of any evidence of fraud on the part of plaintiff or anyone acting on her behalf. On deposition defendant admitted that he read, signed, and understood the contents of the separation agreement. He further stated positively that neither plaintiff nor her attorney misrepresented anything to him. When asked if plaintiff or her attorney told him if he would sign the agreement plaintiff would go back to him, he stated positively that they did not. His strongest assertion was "I was led to believe that the more agreeable I was the better chance I had of her coming back."

We have considered the other contentions argued in defendant's brief and find no merit in them.

We hold that summary judgment in favor of plaintiff was proper.

For the reasons stated, the judgments appealed from are

Affirmed.

Judges HEDRICK and MARTIN concur.

ZENO HERBERT PONDER v. BUDWEISER OF ASHEVILLE, INC. AND WILLIAM ALEXANDER FOX

No. 7624SC33

(Filed 21 July 1976)

1. **Damages §§ 6, 12— special damages — loss of corporate profits — failure to plead — insufficiency of evidence**

In an action to recover for personal injuries received in an automobile accident, the trial court erred in permitting the jury to consider the special damages of loss of corporate profits with respect to a tobacco crop and dairy herd where plaintiff failed to allege specifically such special damages and where plaintiff failed to show with any degree of certainty how the corporate loss of profits was a proximate result of his injuries. G.S. 1A-1, Rule 9(g).

2. **Damages § 16— damages for disfigurement — insufficiency of evidence**

The evidence was insufficient to support the court's instruction that the jury could consider any blemishes, scars or mutilations which tend to mar plaintiff's appearance in determining damages for personal injuries to plaintiff where plaintiff testified only that two knots on his head and minor scratches and a bruise were not permanent and had essentially disappeared.

APPEAL by defendants from *Friday, Judge.* Judgment entered 25 August 1975 in Superior Court, MADISON County. Heard in the Court of Apppeals 4 May 1976.

In his complaint, filed 17 September 1973, the plaintiff alleged that he sustained injuries as the result of an automobile collision which "occurred when the defendant, William Alexander Fox, driving . . . [a] truck owned by the corporate defendant, Budweiser of Asheville, Inc. overtook and ran into

the rear end of [the] . . . automobile operated by the plaintiff. . . ." He alleged that as a result of the collision

> ". . . plaintiff's body was thrown about violently and forcibly within the said Ford automobile and against the steering wheel, dashboard, seat, windows, doors and interior metal parts and portions thereof in such a way and manner that plaintiff's body, head, face, and arms were bruised, contused and injured, plaintiff's neck and cervical spine were wrenched, sprained, strained, damaged and injured, plaintiff's back and lumbar spine were wrenched, sprained, strained, damaged and injured, the vertebrae and discs of plaintiff's back were damaged and injured, the muscles, tissues, tendons and tenues, and ligaments of plaintiff's body were strained, sprained, torn, damaged and injured, and plaintiff's body was caused to suffer and sustain great and excruciating pain, damage and injury, including damage and injury to plaintiff's back, cervical spine, and lumbar spine, which plaintiff is advised, informed and believes it permanent and permanently disabling.
>
> 10. That as result of the negligence of the defendants, plaintiff's brain and central nervous system were shocked, damaged and injured, plaintiff's internal organs were bruised, damaged and injured, and plaintiff was caused to suffer and sustain excruciating pain of mind and body.
>
> 11. That at the time of the collision herein described plaintiff was an able-bodied man, with substantial business interest and substantial earnings and income; that following said collision, plaintiff was disabled, and continues to be partially disabled; that plaintiff has lost substantial earnings and income as result of defendant's negligence; and that plaintiff is advised, informed and believes that as result of certain permanent injuries suffered and sustained as result of defendant's negligence, plaintiff has suffered and sustained permanent loss of earnings and earnings capacity."

Plaintiff sought $150,000 in damages.

Defendants' answer denied plaintiff's substantive allegations.

From jury verdict and judgment for plaintiff for $40,000, the defendants appealed.

Other facts necessary for decision are set out below.

Gudger and McLean, by Lamar Gudger, for plaintiff appellee.

Morris, Golding, Blue & Phillips, by James N. Golding, for defendant appellants.

MORRIS, Judge.

[1] Defendants, noting the plaintiff's evidence as to diminution of profits in the corporate farming operation, contend that the trial court erred ". . . by permitting the plaintiff to speculate as to profits which the corporation might have made . . . [in that] no allegation of such special damage appears in the complaint . . . and . . . [s]peculative evidence of corporation profits are not permitted to show loss of income or earning capacity in a personal injury action." We agree.

Here plaintiff's complaint alleges loss of income and earning capacity, but fails to allege properly and specifically the special damages of loss of corporate profits with respect to his tobacco crop and dairy herd. "In personal injury suits loss of profits are recoverable as special damages if properly pleaded as such, if they arise naturally and proximately from the injury, and if they are reasonably definite and certain." *Smith v. Corsat,* 260 N.C. 92, 99, 131 S.E. 2d 894 (1963). Also see: G.S. 1A-1, Rule 9(g).

Even had plaintiff complied with G.S. 1A-1, Rule 9(g), we still consider plaintiff's introduction of corporate losses improper. Justice Moore, in *Smith v. Corsat, supra,* at pp. 96-97, well stated the law in this area and restatement of his opinion is worthwhile:

> "It is a generally accepted proposition that evidence of the profits of a business in which the injured party in a personal damage suit is interested, which depend for the most part upon the employment of capital, the labor of others, and similar variable factors, is inadmissible in such suit and cannot be considered for the purpose of establishing the pecuniary value of lost time or diminution of earning capacity, for the reasons that a loss of such profits is not the necessary consequence of the injury and such profits are uncertain and speculative. In such circumstances loss of profits cannot be considered either as an element

or the measure of damages. In such case, the measure of damages is the loss in value of the injured person's services in the business. 'Profits' and 'earnings' are not synonymous. Loss of personal earnings is properly considered as an element or measure of damages. *Hendler v. Coffey,* 179 N.E. 801 (Mass. 1932); *Flintjer v. Kansas City,* 204 S.W. 951 (Mo. 1918); *Singer v. Martin,* 164 P. 1105 (Wash. 1917); *Mahoney v. Boston Elevated R. Co.,* 108 N.E. 1033 (Mass. 1915); 25 C.J.S., Damages, s. 86, p. 618; 15 Am. Jur., Damages, s. 155, pp. 571-2. See also 12 A.L.R. 2d Anno—Damages—Plaintiff's Business Profits, pp. 288, 294, 296. (In this Annotation the entire question is fully discussed and cases from many jurisdictions are cited and abstracted.)

However, where the business is small and the income which it produces is principally due to the personal services and attention of the owner, the earnings of the business may afford a reasonable criterion to the owner's earning power. *Bell v. Yellow Cab Co.,* 160 A. 2d 437 (Pa. 1960); 15 Am. Jur., Damages, s. 96, p. 506; 12 A.L.R. 2d 292. In cases where it is not established that the employment of capital, the use of labor of others, or similar variable factors were predominant in the injured person's business or determinative, for the most part, of the receipts realized, it is held that evidence of profits, in a restricted sense, or income (even if one or more of the factors mentioned were present and influential) may be used for the purpose of aiding in establishing a standard for the calculation of damages, if it conforms to the requirements of proximate cause and certainty. It has some bearing upon the question of damages, whether of loss of time or loss or diminution of earning capacity. Such evidence furnishes as safe a guide for the jury, under proper cautionary instructions, as may be found, in the assessment of damages, and becomes useful in helping to determine the pecuniary value of loss of time or impairment of earning capacity. *Amelsburg v. Lunning,* 14 N.W. 2d 680 (Iowa 1944); *Roy v. United Electric R. Co.,* 159 A. 637 (R.I. 1932); *Atlanta v. Jolly,* 146 S.E. 770 (Ga. 1929); *Osterode v. Almquist,* 200 P. 2d 169 (Cal. 1948); *Gombert v. New York C. & H. R. R. Co.,* 88 N.E. 382 (N.Y. 1909); 12 A.L.R. 2d 294, 297."

Here, the diminution of crop yield and herd productivity may be attributable to a host of factors, not the least of which are

purely environmental. Stated simply, plaintiff failed to show with any degree of certainty how the corporate loss of profit is a proximate result of his injuries.

Moreover, this loss was the corporation's and not the plaintiff's. The corporation relied upon considerable capitalization, employed considerable help and was owned by a number of shareholders in addition to plaintiff. There was evidence that plaintiff was paid a salary of $22,000 by the corporation for the year in which he sustained the injuries of which he complains. The trial court erred in allowing the business loss into evidence. See: 45 A.L.R. 3d, Profits of Business as Factor in Determining Loss of Earnings or Earning Capacity in Action for Personal Injury or Death, § 5, pp. 369 et seq. Cf: *Jernigan v. R.R. Co.*, 12 N.C. App. 241, 182 S.E. 2d 847 (1971), (wherein the plaintiff's "*own* trucking business" loss was admissible for purposes of showing an impairment of earning capacity). (Emphasis supplied.) *Love v. Hunt,* 17 N.C. App. 673, 195 S.E. 2d 135 (1973), (also involving a self-employed plaintiff).

[2] Defendants, citing the lack of any supporting evidence, also contend that the trial court erred by instructing the jury that in resolving the damages issue they could consider ". . . any outward blemishes or scars or mutilations which tend to mar the [plaintiff's] appearance. . . ." We, again, agree.

The only evidence of external injury was plaintiff's testimony that he had two "knots" on his head, minor scratches on the shoulder and a bruised hand, and plaintiff testified that those injuries were not permanent and had essentially disappeared. In short, there was no evidence of blemishes, scars or mutilations to plaintiff, and to have instructed that these disfigurements are elements to be considered in the calculation and consideration of damages was error. See: *Spears v. Distributing Co.*, 27 N.C. App. 646, 219 S.E. 2d 817 (1975).

In view of our decision that defendant is entitled to a new trial, we consider it unnecessary to discuss the appellants' other assignments of error, since they are not likely to occur upon the retrial of this matter.

New trial.

Judges PARKER and MARTIN concur.

ROY GRAY v. RICHARD GRAY

No. 768SC149

(Filed 21 July 1976)

1. **Damages § 6— breach of contract — lost profits — showing required for recovery**

Lost profits may be recovered where it is reasonably certain that such profits would have been realized except for the breach of the contract, and where there is substantial evidence by which the damages can be ascertained and measured with reasonable certainty.

2. **Damages § 15— breach of contract to allow cultivation of lands — loss of profits — insufficiency of evidence**

In an action for breach of a contract to allow plaintiff to cultivate certain lands in 1971, plaintiff's evidence of loss of profits was insufficient where plaintiff testified that he tended the same croplands in 1971 as in 1970, except for the lands in question, and plaintiff's tax returns, with farm expense schedules for both years, were introduced, but there was no evidence to indicate whether market prices received for crops were the same in 1971 and 1970 or whether expenses for such items as fertilizer, fuel, chemicals and labor were approximately the same in both years.

3. **Malicious Prosecution § 1— requirements for establishing malicious prosecution**

In order to recover in an action for malicious prosecution the plaintiff has to establish that defendant (1) instituted or procured the institution of an earlier proceeding against plaintiff, (2) maliciously and (3) without probable cause, and (4) that the proceeding terminated in plaintiff's favor.

4. **Malicious Prosecution § 9— probable cause — burden of proof**

In an action for malicious prosecution plaintiff has the burden of alleging and proving that the prior proceeding against him was instituted without probable cause, and probable cause depends upon whether there was a reasonable ground for suspicion, supported by circumstances sufficiently strong to warrant a cautious man's belief in the guilt of accused.

5. **Malicious Prosecution § 13— prior inebriacy action — existence of probable cause — directed verdict proper**

Testimony by plaintiff that he drank every day, that some days he drank more than others, that his drinking had increased over the years, and that he drank "probably a pint a day" was sufficient to show that defendant, who was plaintiff's brother, had reasonable grounds to suspect that plaintiff had an alcoholic problem serious enough to warrant the institution of an earlier inebriacy proceeding; therefore, the trial court should have directed a verdict in defendant's favor as to malicious prosecution.

Gray v. Gray

APPEAL by defendant from *Griffin, Judge.* Judgment entered 4 October 1975 in Superior Court, WAYNE County. Heard in the Court of Appeals 26 May 1976.

This civil action is to recover damages for breach of contract and for malicious prosecution. Plaintiff and defendant are brothers.

Plaintiff alleged that he had a contract with defendant, acting as agent for their father, Claudie Gray, to cultivate certain lands, known as the Benson Farm and the homeplace, for the crop year 1971. After plaintiff began cultivation it is alleged that defendant ordered him off the property and thus breached the contract.

It is also alleged that defendant maliciously instituted a special proceeding to have plaintiff committed as an inebriate. (Plaintiff was in fact arrested pursuant to the proceeding and released a few hours later after being examined by two physicians.)

Defendant answered and denied all material allegations.

At the close of plaintiff's evidence, and at the close of all evidence upon a trial by jury, defendant moved for directed verdict in the action for breach of contract on the grounds, among others, that the evidence failed to show damages, and in the malicious prosecution action on the grounds that there was probable cause as a matter of law for defendant to institute inebriacy proceedings against plaintiff. The motions were denied.

The jury found that plaintiff was entitled to damages of $4,000 for breach of contract, and $25,000, including $10,000 punitive damages, for malicious prosecution. Judgment was entered on the verdict and defendant moved to have the verdict and judgment set aside, and to have judgment in accordance with his previous motions for directed verdict. Motion was denied, as was a motion for new trial, and defendant appealed to this Court.

W. Powell Bland and Herbert B. Hulse for defendant appellant.

Roland C. Braswell for plaintiff appellee.

ARNOLD, Judge.

Plaintiff testified that he tended the same croplands in 1971 as he tended in 1970, except for the Benson farm and the homeplace. He stated that the crop allotments, weather conditions, and the equipment he used were about the same for both years. Plaintiff's tax returns, with farm income and expense schedules, for 1970 and 1971 were introduced also.

Defendant assigns as error the admission of plaintiff's evidence as to damages for breach of contract. He contends that the proof of lost profits was uncertain and speculative. We see merit in this contention.

[1] Lost profits may be recovered where it is reasonably certain that such profits would have been realized except for the breach, and where there is substantial evidence by which the damages can be ascertained and measured with reasonable certainty. *Perkins v. Langdon,* 237 N.C. 159, 74 S.E. 2d 634 (1953). All reasonable factors must be shown to provide a basis for determining that the profits would have been realized except for the breach. *Tillis v. Cotton Mills* and *Cotton Mills v. Tillis,* 251 N.C. 359, 111 S.E. 2d 606 (1959); also, *Daly v. Weeks,* 10 N.C. App. 116, 178 S.E. 2d 30 (1970).

[2] Evidence of plaintiff's special damages was insufficient. No evidence was offered to indicate whether market prices received for crops were the same in 1971 as they were in 1970, or whether expenses, for such items as fertilizer, fuel, chemicals and labor, were approximately the same in 1971 as in 1970. These are reasonable factors to be considered in ascertaining and measuring with reasonable certainty the amount of plaintiff's lost profits.

[3] In order to recover in an action for malicious prosecution the plaintiff has to establish that defendant (1) instituted, or procured the institution of, an earlier proceeding against plaintiff, (2) maliciously and (3) without probable cause, and (4) that the proceeding terminated in plaintiff's favor. See 5 N. C. Index 2d, Malicious Prosecution, § 1, p. 274, and cases cited therein; also see Malicious Prosecution in North Carolina, 47 N.C.L. Rev. 285.

[4] Plaintiff has the burden of alleging and proving that the prior proceeding against him was instituted without probable cause. *Greer v. Broadcasting Co.,* 256 N.C. 382, 124 S.E. 2d 98

(1962). A lack of probable cause is not established by showing that the prior proceeding terminated in plaintiff's favor, *Fowle v. Fowle,* 263 N.C. 724, 140 S.E. 2d 398 (1965), or that the proceeding was instituted maliciously, *Tucker v. Davis,* 77 N.C. 330 (1877), or that plaintiff was innocent, *Mooney v. Mull,* 216 N.C. 410, 5 S.E. 2d 122 (1939). Probable cause depends upon whether there was a reasonable ground for suspicion, supported by circumstances sufficiently strong to warrant a cautious man's belief in the guilt of the accused. *Cook v. Lanier,* 267 N.C. 166, 147 S.E. 2d 910 (1966).

[5] The question critical to this case is whether plaintiff's evidence established a lack of probable cause, i.e., whether there was a reasonable ground for suspicion by a reasonable man that plaintiff was an inebriate. Defendant contends that the trial court should have directed a verdict in his favor as to malicious prosecution because the evidence established as a matter of law that he had probable cause to institute the inebriacy proceeding. We agree with defendant.

It is not necessary to review all the pertinent evidence regarding plaintiff's drinking habits. There is contradictory evidence in the record, but plaintiff himself, on cross-examination, testified concerning his drinking pattern over a thirteen year period. He stated that he drank every day, and that some days he drank more than others. He further testified that his drinking had increased over the years, and, though he denied drinking a fifth of whiskey a day, he admitted that he drank "probably a pint a day."

This evidence was sufficient for a reasonable man to have reasonable grounds to suspect that plaintiff, who was defendant's brother in this case, had an alcoholic problem serious enough to warrant the institution of an inebriacy proceeding.

It is our opinion that defendant's motion for directed verdict should have been granted as to malicious prosecution. Since defendant complied with G.S. 1A-1, Rule 50(b)(1) by moving for judgment notwithstanding the verdict, in addition to moving for directed verdict at the close of all the evidence, we direct entry of judgment in accordance with defendant's motion as to the allegations of malicious prosecution. G.S. 1A-1, Rule 50(b)(2); *Nichols v. Real Estate, Inc.,* 10 N.C. App. 66, 177 S.E. 2d 750 (1970).

The verdict and judgment are vacated and a new trial is ordered in plaintiff's action for breach of contract. The cause is remanded with direction that judgment be entered in accordance with defendant's motion for directed verdict in the action for malicious prosecution.

New trial in part.

Reversed and remanded in part.

Judges PARKER and HEDRICK concur.

KONSTANTINE A. KONOPISOS AND WIFE, ARLENE M. KONOPISOS, PLAINTIFFS v. M. RANDOLPH PHILLIPS, ANNA BOYCE PHILLIPS, PHILIP A. TEMPLETON, DWIGHT CRITCHER, VIRGINIA G. CRITCHER, FRED T. GREER AND THE NORTHWESTERN BANK, DEFENDANTS

No. 7623DC159

(Filed 21 July 1976)

Vendor and Purchaser § 11— interstate land sale — absence of disclosure filing and property report — rights of assignees of purchasers

Assignees of the purchasers of land subject to the Interstate Land Sales Full Disclosure Act are not entitled to rescind the sale to the purchasers on the ground that the sellers failed to file certain disclosure information with the Dept. of Housing and Urban Development and failed to give the purchasers a property report since protection of the Act applies only to those who have bought from the developers of the land. 15 U.S.C.A. §§ 1701, 1703 and 1709.

APPEAL by plaintiff from *Osborne, Judge.* Judgment entered 22 December 1975 in District Court, ASHE County. Heard in the Court of Appeals 27 May 1976.

In a complaint filed 23 July 1975, the plaintiffs alleged that defendants entered into a contract for the sale of certain tracts of land to Dean A. Konopisos and wife, Anne M. Konopisos, and that the transaction ". . . constituted an interstate land sale as defined under 15 USCA Secs. 1701 through 1720." The plaintiffs further alleged that ". . . the sellers did not comply with said Interstate Land Sales Full Disclsoure Act in that the sellers did not file with the Office of Interstate Land Sales

Registration of the Department of Housing and Urban Development either Statement of Record or an exemption and in that the sellers failed to give to the purchasers a property report as required by 15 USCA Sec. 1703." More specifically, the plaintiffs, who purportedly obtained all rights and interest in the transaction from a 16 August 1974 assignment, maintained that ". . . on or about May 5, 1975, the Office of Interstate Land Sales Registration of the Department of Housing and Urban Development did hold a hearing regarding violations of the Interstate Land Sales Full Disclosure Act . . . and did determine that all lot sales at Trojan Horse Picnic Area subsequent to January 27, 1972, are and have been subject to the jurisdiction of the Act, and that all lot sales covered by the Act since March 31, 1972, were made in violation of the Act and may be voidable at the purchaser's option." Finally, the plaintiffs alleged that defendants have refused to return certain payments pursuant to a "Notice of Rescission" and to void and cancel a note. Based on the foregoing, the plaintiffs prayed for restitution and a judgment setting the purported "Land Sale Contract" and "note" aside.

The defendants denied the plaintiff's substantive allegations in their respective answers.

Both plaintiff and individual defendants subsequently moved for summary judgment. Plaintiffs' motion and supporting documentation basically covered the same points noted in their complaint. In pertinent part the individual defendant's motion provided that:

> "(2) Lot sales at Trojan Horse Picnic Area subsequent to 27 January 1972 are subject to the provisions of the Interstate Land Sales Full Disclosure Act and lot sales by the individual defendants between 31 March 1972 and 21 May 1975 were made in violation of the Act.
>
> (3) The Office of Interstate Land Sales Registration has required the individual defendants to send notification-of-right-of-rescission to those purchasers whose rights under the Act have been violated by the individual defendants. The individual defendants are not, however, required to notify those purchasers who have resold or transferred their interest in the property and can no longer reconvey the property to the individual defendants.

(4) The individual defendants have never sold any land to the plaintiffs and have never acted as an agent for any person, persons, or corporation in selling any land to the plaintiffs.

(5) The Interstate Land Sales Registration Act has no jurisdiction over lot sales by individual purchasers. The protections granted to purchasers by this Act extend only to those who have bought property in the Trojan Horse Picnic Area from the individual defendants. (Individuals Defendants' Exhibits C and D.)

(6) There is no genuine issue as to any material fact, and the individual defendants are entitled to a judgment as a matter of law."

Defendants also presented supporting documentation.

From summary judgment for apparently all defendants, plaintiffs appealed.

Other facts necessary for decision are set out below.

Charlotte S. Bennett and George G. Cunningham for plaintiff appellants.

Vannoy & Reeves, by Wade E. Vannoy, Jr., and Jimmy D. Reeves, for the individual defendants.

MORRIS, Judge.

Plaintiff appellants contend that the trial court erred in granting the defendant sellers' motion for summary judgment. We find no merit to this contention.

On 1 December 1973, Mr. and Mrs. Dean A. Konopisos signed a purported land sale contract for the purchase from the defendant sellers of the particular land in question. Subsequently, the purchasers "assigned" their rights to the plaintiffs. More specifically, that "Assignment" provided that

"We, Dean A. Konopisos and Anne M. Konopisos, second parties of the within contract for the purchase of Tracts 55, 66, 60, 61, 78, 96 and 97 of the Trojan Horse Picnic Area located in Ashe County, North Carolina, as shown in the attached copy of said contract, for and in consideration of ONE DOLLAR ($1.00) and other good and valuable consideration, the receipt whereof is hereby acknowledged,

do hereby sell, assign, and transfer to KONSTANTINE A. KONOPISOS and ARLENE M. KONOPISOS all our right, title, and interest in and to said contract, including all rights of action or otherwise to us accrued or hereafter to accrue thereunder."

Notwithstanding the broad language of the agreement, the plaintiffs have no standing to sue. Under the Interstate Land Sales Full Disclosure Act the defendant sellers were required to file and register certain disclosure documentation with the government and provide related information to their purchasers. Their failure to so file subjected them to suit by their buyers, Dean Konopisos and Anne M. Konopisos, but not by these plaintiffs. See: 15 U.S.C.A., §§ 1701, 1703, and 1709.

The pertinent portions of these statutes are as follows:

"§ 1701. Definitions

* * *

(2) 'person' means an individual, or an unincorporated organization, partnership, association, corporation, trust, or estate;".

"§ 1703. Prohibitions relating to sale or lease of lots in subdivisions; voidability of contracts or agreements

(a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or the mails—

(1) to sell or lease any lot in any subdivision *unless a statement of record with respect to such lot is in effect in accordance with § 1706 of this title and a printed property report, meeting the requirements of § 1707 of this title, is furnished to the purchaser* in advance of the signing of any contract or agreement for sale or lease by the *purchaser;* . . .

(b) Any contract or agreement for the purchase or leasing of a lot in a subdivision covered by this chapter, where the property report has not been given to the purchaser in advance or at the time of his signing, shall be voidable at the option of the purchaser. A purchaser may revoke such contract or agreement until midnight of the third

> business day following the consummation of the transaction, where he has received the property report less than forty-eight hours before he signed the contract or agreement, and the contract or agreement shall so provide." (Emphasis supplied.)

A review of the operative provision supports our conclusion. Stated simply, this Act was designed to protect *purchasers* of real property and to fulfill that goal the Act establishes rigorous disclosure provisions and requirements. The logical beneficiary and recipient of this information is the seller's buyer and not the buyer's assignee; the latter having never dealt with the seller in the first place.

With this interpretation in mind, we note that 15 U.S.C.A., § 1701(9) provides that a " 'purchaser' means an actual or prospective purchaser or lessee of any lot in a subdivision. . . ." Had Congress, intended to extend "purchasers" to include assignees it would have so done. However, no such extension appears in this definitional section and the admittedly rather narrow range of covered "purchasers" harmonizes with the overall purpose of that Act; to wit, disclosure of all material facts to buyers from the actual developers of the site.

The judgment of the trial court is

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. DENNIS K. TOLLEY

No. 7628SC182

(Filed 21 July 1976)

1. Burglary and Unlawful Breakings § 2— breaking and entering — consent of occupant — intent to steal property of other occupants

Defendant did not have such consent to enter a residence by an occupant thereof as would absolve him of guilt of the crime of feloniously breaking and entering the residence where his entry was the result of a conspiracy with a friend to enter the residence occupied by the friend and his parents and to steal therefrom property owned by the parents.

2. **Criminal Law § 50; Larceny § 6— value of personalty — nonexpert opinion**

Even though a witness is not qualified as an expert he may testify as to the value of his personal property.

3. **Criminal Law § 76— confession — absence of inducements**

Trial court's finding that an officer made no inducements to defendant in order to obtain a confession was binding on appeal since it was supported by competent evidence on *voir dire*.

4. **Criminal Law § 113— recapitulation of evidence — references to accomplices not on trial**

The trial court did not err in recapitulating evidence that persons who were not on trial were involved in the crimes for which defendant was being tried.

5. **Larceny § 8— submission of lesser offense — absence of prejudice**

Defendant in a prosecution for felonious larceny was not prejudiced by the court's submission of the lesser offense of non-felonious larceny.

APPEAL by defendant from *Ferrell, Judge*. Judgment entered 12 December 1975 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 7 June 1976.

Defendant was tried on an indictment charging felonious breaking and entering and felonious larceny. The State's evidence at trial tended to establish that the defendant, Patrick Burnette, and Michael Rigsby devised a plan to rob the residence of Mr. and Mrs. Clement Rigsby, parents of Michael Rigsby. Pursuant to their scheme, on 22 July 1975, defendant and Pat Burnette entered the Rigsby home by using a key which Michael Rigsby had told them was located over the door. Mrs. Rigsby also testified that Burnette had seen the Rigsbys place the key over the door on several occasions and did not need Michael Rigsby's information regarding the location of the key.

Upon entering the Rigsby's residence defendant and Burnette stole an RCA color television, a police band scanner, a Panasonic radio, a stereo component set, and $37.81 in pennies. Defendant carried the stolen merchandise by automobile to a tunnel where he met with Patrick Edward Haskins. Defendant and Haskins transferred the stolen merchandise from the defendant's car to Haskins' car. Total value of the stolen merchandise was $1,700.

Officer Robert Webster testified that defendant made a statement to him regarding his involvement in the crime. Defend-

ant objected to his statement being admitted into evidence, and a voir dire hearing was held. The trial judge concluded that the statement was admissible, and Officer Webster testified that defendant admitted that he had participated in the breaking and entering and larceny.

Defendant did not present any evidence. The jury returned guilty verdicts as to each charge. From the judgments imposing prison sentences, defendant appealed to this Court.

Attorney General Edmisten, by Associate Attorney Richard L. Griffin, for the State.

Cecil C. Jackson for defendant appellant.

ARNOLD, Judge.

[1] Defendant assigns error to the failure of the court to grant his motion for judgment of dismissal. He contends that as a matter of law he is not guilty of breaking and entering because he had permission from an occupant of the home, the Rigsby's son, Michael, to enter the home. We disagree.

A person entering a residence with the good faith belief that he has the consent of the owner or occupant or his authorized agent is not chargeable with the offense of breaking and entering. *See* 93 A.L.R. 2d 534, § 3, Rule that Consent Constitutes a Defense. However, the circumstances of the instant case do not involve parties with good faith beliefs that they had consent to enter the residence. Mrs. Rigsby testified that Burnette (the defendant's accomplice) had been told never to come to the Rigsby home.

Defendant could not have reasonably believed that Michael Rigsby had authority to permit defendant to enter his parents' residence for the purpose of stealing valuables which belonged to his parents, and not to Michael Rigsby. Evidence establishes that Michael Rigsby knew of defendant's and Burnette's plot and felonious intent to enter into the Rigsby home and steal his parents' valuables. Defendant did not have authorized consent to enter the Rigsby home. *See State v. Friddle,* 223 N.C. 258, 25 S.E. 2d 751 (1943) ; *State v. Rowe,* 98 N.C. 629, 4 S.E. 506 (1887).

[2] There is no merit to defendant's next contention that the trial court erred in allowing Mr. Rigsby to testify regarding

the value of the stolen property. Even though a witness is not qualified as an expert he may testify as to the value of his personal property. *State v. Weinstein,* 224 N.C. 645, 31 S.E. 2d 920 (1944); *see also,* Stansbury, N. C. Evidence, Brandis Revision, § 128, Value.

There is also no merit in defendant's argument that the court erred in failing to limit the scope of testimony given by Rigsby for purposes of corroborating the witness, Hunter. He argues that the corroborative testimony exceeded the scope of Hunter's testimony. "Slight variances in corroborating testimony do not render such testimony inadmissible." *State v. Laws,* 16 N.C. App. 129, 191 S.E. 2d 416 (1972).

[3] Defendant next excepts to the finding of fact by the court on voir dire that the arresting officer made no inducements to defendant in order to obtain a confession. Since the trial court's finding of fact that "the officer made no offer of hope of reward or inducement for the defendant to make a statement" is supported by competent evidence, it is conclusive on appeal. *State v. Carey,* 285 N.C. 509, 206 S.E. 2d 222 (1974).

[4] Finally, defendant contends that the trial court erred in its instructions to the jury. He argues that the trial court erred in recapitulating the evidence by mentioning other persons' involvement in the crime who were not on trial or being charged in the crime. Defendant's argument is without merit. G.S. 1-180 requires the trial judge to recount the evidence presented at trial and to explain the law applicable. *State v. Gaines,* 283 N.C. 33, 194 S.E. 2d 839 (1973). Furthermore, objection to the trial court's recapitulation of the evidence should have been made before the jury retired so as to afford the court an opportunity for correction; otherwise, the objections are deemed to have been waived and will not be considered on appeal. *State v. Hargrove,* 27 N.C. App. 36, 217 S.E. 2d 715 (1975).

[5] Defendant also contends that there was no evidence to support the court's charging the jury on non-felonious larceny, and that such a charge was error. Defendant shows no prejudice by the court's instructions on the lesser charge of non-felonious larceny. *State v. Chase,* 231 N.C. 589, 58 S.E. 2d 364 (1950); *State v. Bunton,* 27 N.C. App. 704, 220 S.E. 2d 354 (1975).

All of defendant's assignments of error have been reviewed, and we find

No error.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. BRIAN EPPLEY

No. 7619SC212

(Filed 21 July 1976)

1. **Escape § 1; Indictment and Warrant § 17— failure to return to prison at appointed time — no variance between indictment and proof**

Where the indictment charged defendant with "failing to return to the prison unit at the appointed time as ordered," a violation of G.S. 148-4 and punishable under G.S. 148-45, and the evidence showed that, though defendant was not on a work release program or on temporary parole, he was allowed to leave confinement by "other authority of law" to clean a chapel outside the prison, there was no variance between the indictment and proof.

2. **Constitutional Law § 30— denial of speedy trial — failure to carry burden of proof**

Defendant failed to show that his right to a speedy trial was denied where defendant did not show that a delay of his trial was due to neglect or wilfulness on the part of the State, nor did he show prejudice in the preparation and presentation of his defense which resulted from the delay.

APPEAL by defendant from *Kivett, Judge.* Judgment entered 17 December 1975 in Superior Court, CABARRUS County. Heard in the Court of Appeals 10 June 1976.

On 24 April 1975 defendant was charged in a warrant with the violation of G.S. 148-45(a), felonious escape. The warrant alleged that on 23 March 1975 the defendant escaped from the custody of the Mt. Pleasant unit of the State Department of Corrections.

Prior to trial, on 15 October 1975, the defendant entered a motion to dismiss on the grounds that he had been denied a speedy trial. Defendant's motion was denied on 16 October 1975, and defendant's trial was scheduled for the next session of the Superior Court, Cabarrus County.

On 3 November 1975, defendant filed a motion to dismiss on the grounds that the State had failed to seek and obtain an

indictment against the defendant. An indictment was returned against the defendant on 10 November 1975, but the indictment was defective. The State moved for a continuance until the 8 December 1975 Session of Cabarrus County Superior Court. On 14 November 1975 Superior Court Judge Robert A. Collier, Jr., granted the State's motion for continuance and denied the defendant's motion to dismiss. A proper indictment was returned in the December Session of the Cabarrus County Superior Court, and the matter was scheduled for trial on 17 December 1975. Defendant entered another motion to dismiss on the grounds that he had been prejudiced by the denial of a speedy trial because he had been denied honor grade status. Defendant's motion was denied.

The State presented evidence at trial tending to establish that the defendant was serving a prison sentence for breaking and entering and had obtained a honor grade status. On 23 March 1975 defendant was instructed to clean a chapel located on the outside of the prison fence. The defendant did not return from the chapel, and on 7 April 1975 he was arrested in Charlotte.

Defendant testified that he left the chapel in order to find a job on which he could work when he obtained work release.

The jury returned a verdict of guilty as charged. From the judgment imposing a prison sentence, defendant appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General Alfred N. Salley, for the State.

Davis, Koontz and Horton, by Clarence E. Horton, Jr., for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends that the indictment purported to charge a violation of G.S. 148-45(g) which pertains to persons in custody of the Department of Correction who are assigned to work release programs or on temporary parole. He argues that since he was not on work release or temporary parole there was a fatal variance between indictment and proof, and that the court should have granted his motion to dismiss.

There was no variance between the indictment and proof. The evidence indicates that while defendant was not on a work

release program or on temporary parole he was allowed to leave confinement by "other authority of law" to clean a chapel just outside the prison. The indictment charged defendant with "failing to return to the prison unit at the appointed time as ordered," a violation of G.S. 148-4 and punishable under G.S. 148-45.

G.S. 148-4 provides:

> "The Secretary of Corrections may extend the limits of the place of confinement of a prisoner, as to whom there is reasonable cause to believe he will honor his trust, by authorizing him, under prescribed conditions, to leave the confines of that place unaccompanied by a custodial agent for a prescribed period of time to . . . (6) Participate in community-based programs of rehabilitation. . . .
>
> The willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed to the place of confinement designated by the Secretary of Correction, shall be deemed an escape from the custody of the Secretary of Correction punishable as provided in G.S. 148-45."

Defendant's second argument is that the court erred in failing to dismiss the charges because he had been denied his right to a speedy trial. He asserts that the State delayed his trial for eight months without justification, and that he had requested a speedy trial. He further contends that the delay prejudiced him because as a prisoner he could not be considered for honor grade status while the escape charge was pending.

[2] We see no merit in defendant's position. Defendant failed to meet his burden of showing that the delay was due to neglect or wilfulness on the part of the State. *State v. Frank,* 284 N.C. 137, 200 S.E. 2d 169 (1973) ; *State v. Arnold,* 21 N.C. App. 92, 203 S.E. 2d 395 (1974). Furthermore, defendant has shown no prejudice in the preparation and presentation of his defense which resulted from the delay.

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

BANK OF VIRGINIA-CENTRAL v. TAURUS CONSTRUCTION COMPANY, CECIL C. CRAIG, PAUL K. CRAIG, AND THE CAROLINA BANK

No. 7611SC207

(Filed 21 July 1976)

Uniform Commercial Code § 74— transfer of secured property — continuation of security interest

A bank's security interest in equipment acquired at the time of purchase of the equipment from the bank continued after the purchaser's transfer of the equipment to a corporation where the bank did not authorize the transfer from the purchaser to the corporation. G.S. 25-9-306.

APPEAL by plaintiff from *Gavin, Judge.* Order entered 18 December 1975 in Superior Court, LEE County. Heard in the Court of Appeals 9 June 1976.

Plaintiff seeks possession of certain earth moving equipment in which it claims a security interest by virtue of a security agreement executed by Taurus Construction Company. Defendant Carolina Bank claims a security interest in the same equipment.

The pertinent facts, as found by the trial judge, are as follows:

"FINDINGS OF FACT

1. On June 20, 1974, The Carolina Bank sold and delivered to Cecil C. Craig and wife, Nellie K. Craig, the following equipment . . . [the equipment that is the subject of this action]. In payment for the equipment the Craigs gave The Carolina Bank their note and security agreement of the same date granting a security interest in the aforesaid equipment to the Bank, which security interest was duly perfected by filing completed on June 26, 1974.

2. On July 11, 1974, Cecil C. Craig organized a North Carolina corporation under the name of Taurus Construction Company, and thereafter operated the same as its sole stockholder and director.

3. Upon the date of its incorporation, Taurus Construction Company accepted the offer of the Craigs to transfer all of the equipment acquired from The Carolina

Bank to the Company, solely in consideration of the assumption by the Company of their indebtedness to The Carolina Bank. The only documentation of the proposed transfer of equipment and assumption of indebtedness was contained in the organizational minutes of Taurus Construction Company.

4. The Carolina Bank was not told of and did not authorize the transfer of the equipment by the Craigs or the assumption of the indebtedness by Taurus Construction Company. The Security Agreement between the Craigs and The Carolina Bank specifically provides that ' . . . nothing herein shall be construed as consent or authorization by Secured Party to any sale or other disposition of any part thereof . . . ' (i.e., the collateral), and The Carolina Bank did not otherwise authorize the transfer, sale, exchange or other disposition of the collateral by the Craigs.

5. On July 17, 1974, the plaintiff sold to Taurus Construction Company certain items of equipment and in payment received the Company's note and purchase money security agreement. Thereafter financing statements covering only that purchased equipment were duly filed and plaintiff's security interest therein perfected. All that equipment has now been repossessed by the plaintiff and there is no controversy as to plaintiff's right of possession to such equipment.

6. Taurus Construction Company failed to make the scheduled installment payments on its original equipment note to the plaintiff and in response to plaintiff's demands and agreement to defer immediate repossession of its original collateral, Taurus Construction Company entered into an additional security agreement with the plaintiff bearing the date of October 4, 1974, but which in fact was not signed or delivered until the last week of November, 1974. Such additional security agreement purported to grant plaintiff a security interest in

' . . . all accounts, contract rights, general intangibles, inventory instruments, documents, chattel paper and equipment as listed below, but not limited to, including all goods represented thereby and all goods that may be reclaimed or repossessed from or returned by account debtors, now owned or hereafter acquired by the Borrower, to secure all in-

debtedness of every kind and description, however arising, of the Borrower to the Bank, whether such indebtedness be direct or indirect, fixed or contingent, liquidated or unliquidated . . . '

'THE SECURITY AGREEMENT does not modify or change in any way a Purchase Money Security Agreement dated the 17th day of July, 1974, which grants the Bank a purchase money security interest in the following equipment . . . '

The only equipment thereafter listed was the equipment originally sold by the plaintiff to Taurus Construction Company. No other references to specific equipment appeared in the security agreement or the financing statements subsequently filed by the plaintiff in the office of the Lee County Register of Deeds on November 27, 1974, and in the office of the Secretary of State on December 4, 1974.

7. When Taurus Construction Company entered into the additional security agreement, plaintiff's representatives were told that all of the equipment in question was encumbered, which fact was confirmed by Taurus Construction Company's financial statements previously furnished to the plaintiff.

8. Plaintiff also knew that the equipment in question which it is now seeking to recover from The Carolina Bank was sold by that Bank to the Craigs under the security agreement of June 20, 1974, and that at the time plaintiff took its second security agreement from Taurus Construction Company plaintiff knew that there had been no amendment or termination of the financing statements evidencing the security interest of The Carolina Bank. Plaintiff made no inquiry of The Carolina Bank with regard to the status of The Carolina Bank's security interest.

9. Cecil C. Craig and wife, Nellie K. Craig defaulted on their obligation to The Carolina Bank and The Carolina Bank has taken into its possession the equipment listed in its security agreement with the exception of one piece of equipment which was destroyed by fire."

The court then made the following conclusions of law:

"CONCLUSIONS OF LAW

1. The security interest of The Carolina Bank in the equipment in question perfected on June 26, 1974, continued in such collateral notwithstanding the subsequent transfer of the equipment by the Debtors to Taurus Construction Company.

2. Plaintiff's security interest, if any, does not have priority over the previously perfected security interest of The Carolina Bank."

Plaintiff was denied possession of the property and appealed.

Horton, Singer & Michaels, by Richard G. Singer, for plaintiff appellant.

McDermott & Parks, by George M. McDermott, for defendant appellees, Taurus Construction Company and Cecil C. Craig.

Harrington & Shaw, by Gerald E. Shaw, for defendant appellee, The Carolina Bank.

VAUGHN, Judge.

Counsel are to be congratulated on their well prepared briefs which reflect careful research on the several Uniform Commercial Code questions they raise. In our view of the case, however, it is not necessary for us to discuss either whether the transaction between Craig and his solely owned corporation was a disposition of the property within the meaning of the code or whether the rights of the parties are affected by plaintiff's actual knowledge or lack of knowledge of the security agreement between Craig and The Carolina Bank.

The applicable code section is as follows:

"(2) Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor." G.S. 25-9-306.

Thus, unless Carolina Bank authorized the "transfer" from Craig to Taurus Construction Company, that Bank's security interest continues in the equipment. Whether The Carolina Bank authorized the transfer was a question of fact for determination by the trial judge. The judge found as a fact that Carolina Bank did not authorize the transfer. If the trial judge's findings of fact are supported by competent evidence, they are conclusive on appeal.

There is evidence in the record to support the judge's finding. Craig testified:

> "I never received any authorization from The Carolina Bank to organize Taurus in the manner that I did or to assign the equipment to Taurus Construction Company. Paul was the general manager and he worked this corporation up. I was the owner of the equipment that came from The Carolina Bank. Neither The Carolina Bank nor anyone representing it told me to transfer the equipment to Taurus Construction Company.
>
> * * *
>
> I did not receive any other consideration. I did not discuss with Mr. Rush or anyone else in The Carolina Bank the organization or Taurus Construction Company. I did not authorize anyone to have such discussion."

The finding of fact also finds support elsewhere in the record including the testimony of the witness Rush, Vice President of Carolina Bank.

The judgment from which plaintiff appeals is affirmed.

Affirmed.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. ALBERT FINLEY CHESTER

No. 7625SC141

(Filed 21 July 1976)

1. Automobiles § 3— driving while license suspended — knowledge that license revoked — burden of proof

While a specific intent is not an element of the offense of operating a motor vehicle on a public highway while one's license is sus-

pended or revoked, the burden is on the State to prove that defendant had knowledge at the time charged that his operator's license was suspended or revoked; the State satisfies this burden when, nothing else appearing, it has offered evidence of compliance with the notice requirements of G.S. 20-48 because of the presumption that he received notice and had such knowledge. However, when there is some evidence to rebut this presumption, the issue of guilty knowledge is raised and must be determined by the jury under appropriate instruction from the trial court.

2. **Automobiles § 3— driving while license suspended — notice to defendant — proper jury instructions**

In a prosecution for violation of G.S. 20-28(a) where the evidence discloses that the Department of Motor Vehicles complied with the notice requirements of G.S. 20-48: (1) where there is *no* evidence that defendant did not receive the notice mailed by the Department, it is not necessary for the trial court to charge on guilty knowledge; (2) where there is some evidence of failure of defendant to receive the notice or some other evidence sufficient to raise the issue, then the trial court must, in order to comply with G.S. 1-180 and apply the law to the evidence, instruct the jury that guilty knowledge by the defendant is necessary to convict; and (3) where *all* the evidence indicates that defendant had no notice or knowledge of the suspension or revocation of license, a nonsuit should be granted.

3. **Automobiles § 3— driving while license suspended — knowledge of defendant — improper jury instruction**

In a prosecution of defendant for driving while his license was suspended where defendant offered evidence that he did not receive notice and had no knowledge that his license had been suspended, and the trial court did not charge the jury that it could find defendant guilty only if he knew of the license suspension, defendant is entitled to a new trial.

APPEAL by defendant from *Baley, Judge.* Judgment entered 29 October 1975, Superior Court, CALDWELL County. Heard in the Court of Appeals 25 May 1976.

Defendant was charged with operating a motor vehicle on a public highway while his chauffeur license was suspended.

Evidence for the State tends to show that on 20 May 1975 defendant's car was stopped by Trooper Owens because of a defective rear light. Defendant surrendered his operator's license and registration card. Trooper Owens wrote to the Department of Motor Vehicles and received a certified copy of defendant's driving record, which indicated that as of 29 March 1975 defendant's license was in a state of suspension. A letter from the Department entitled "Order of Security Requirement or Suspension" was also introduced in evidence which was signed

by a Department employee who verified that the letter was deposited in the United States Mail, postage prepaid to defendant's address as it appeared on the records of the Department on the date of mailing.

Defendant offered evidence tending to show that he did not receive the letter, had moved to Tennessee where he turned in his North Carolina license, and received a Tennessee license. Defendant was found guilty and appealed from the judgment.

Attorney General Edmisten by Assistant Attorney General William B. Ray and Special Deputy Attorney General William W. Melvin for the State.

L. H. Wall for defendant appellant.

CLARK, Judge.

In *State v. Teasley,* 9 N.C. App. 477, 176 S.E. 2d 838, cert. denied, 277 N.C. 459, 177 S.E. 2d 900 (1970), this Court held that to convict for a violation of G.S. 20-28(a) the State must prove: (1) the operation of a motor vehicle, (2) on a public highway, (3) while one's operator's license is suspended or revoked; and that when the Department complied with the procedure (G.S. 20-48) as to notice of suspension or revocation of operator's license, such compliance constituted constructive notice to the defendant that his license had been suspended or revoked. Judge Mallard, for the Court, wrote: "There is nothing in the statute [G.S. 20-28(a)] which would imply that knowledge or intent is a part of the crime of operating a motor vehicle after one's license has been suspended."

In *State v. Atwood,* filed 17 June 1976, the Supreme Court of North Carolina, in reversing the Court of Appeals (27 N.C. App. 445), held that all the evidence indicated that defendant had no notice or knowledge of the suspension of her operator's license, which removed the criminal character from defendant's conduct, and the trial court should have granted a nonsuit. *State v. Teasley, supra,* was not overruled but was distinguished in that there was no evidence in *Teasley* to rebut the presumption that notice was received upon the mailing, whereas in *Atwood* all the evidence rebutted that presumption.

In the case before us all of the evidence did not rebut the presumption of notice and knowledge, but the defendant offered evidence that he did not receive a notice mailed by the Depart-

ment because at the time of mailing he had left this State and moved to Tennessee. Thus, defendant's evidence raised the issue of guilty knowledge.

The question of guilty knowledge was raised in *State v. Elliott,* 232 N.C. 377, 61 S.E. 2d 93 (1950), wherein defendant, charged with transporting intoxicating liquor, offered evidence of lack of knowledge of the presence of liquor in his automobile. The court ordered a new trial for failure of the trial court to charge that defendant was guilty only in the event he knew the liquor was in his automobile, and 232 N.C. at 378 stated:

> "A person is presumed to intend the natural consequences of his act. [Citations omitted.] Hence, ordinarily, where a specific intent is not an element of the crime, proof of the commission of the unlawful act is sufficient to support a verdict. [Citation omitted.] . . . .
>
> Nothing else appearing, it would not be necessary for the court, in the absence of a prayer, to make reference in its charge to guilty knowledge or intent. *Scienter* is presumed. . . . "

See also *State v. Welch,* 232 N.C. 77, 59 S.E. 2d 199 (1950); *State v. Stacy,* 19 N.C. App. 35, 197 S.E. 2d 881 (1973); *State v. Gleason,* 24 N.C. App. 732, 212 S.E. 2d 213 (1975).

[1] While a specific intent is not an element of the offense of operating a motor vehicle on a public highway while one's license is suspended or revoked, the burden is on the State to prove that defendant had knowledge at the time charged that his operator's license was suspended or revoked; the State satisfies this burden when, nothing else appearing, it has offered evidence of compliance with the notice requirements of G.S. 20-48 because of the presumption that he received notice and had such knowledge. When there is some evidence to rebut this presumption, the issue of guilty knowledge is raised and must be determined by the jury under appropriate instruction from the trial court.

[2] We conclude that in a prosecution for violation of G.S. 20-28(a) where the evidence for the State discloses that the Department complied with the notice requirements of G.S. 20-48: (1) where there is *no* evidence that defendant did not receive the notice mailed by the Department, it is not necessary for the trial court to charge on guilty knowledge; (2) where there is

some evidence of failure of defendant to receive the notice or *some* other evidence sufficient to raise the issue, then the trial court must, in order to comply with G.S. 1-180 and apply the law to the evidence, instruct the jury that guilty knowledge by the defendant is necessary to convict; and (3) where *all* the evidence indicates that defendant had no notice or knowledge of the suspension or revocation of license, a nonsuit should be granted.

[3] Since in the case before us the defendant offered evidence that he did not receive notice and had no knowledge that his license had been suspended and the court did not charge the jury that it could find the defendant guilty only if he knew of the license suspension, we find error, and there must be a

New trial.

Judges VAUGHN and MARTIN concur.

GILBERT ROGER HADDOCK, ADMINISTRATOR OF THE ESTATE OF ADRIAN GILBERT HADDOCK v. RAYMOND EARL SMITHSON, MOORE-KING-SULLIVAN, INC., AND GLORIA MANNING HARRINGTON

No. 763SC261

(Filed 21 July 1976)

1. **Negligence § 29— retarded intestate crossing highway — instruction from defendant to do so — sufficiency of evidence of negligence**

In an action for the wrongful death of plaintiff's intestate, a 14 year old retarded boy, the trial court erred in entering summary judgment for defendant employee and the corporate defendant where the evidence tended to show that defendant employee was a good friend of intestate, he delivered oil to the homes of intestate's father and uncle, defendant knew intestate was retarded, when defendant delivered oil at intestate's home he would give intestate the delivery ticket and intestate would take it to his grandmother, on the day in question defendant delivered oil to intestate's uncle's home, intestate rode up on his bicycle, defendant gave him a delivery ticket and instructed him to take it to his uncle who was across the highway, and intestate was struck and killed by a vehicle while he was attempting to ride his bicycle across the highway.

2. **Negligence § 35— contributory negligence — failure to plead — retarded intestate — no contributory negligence as matter of law**

In an action for the wrongful death of a 14 year old retarded intestate, defendants cannot contend on appeal that evidence pre-

sented at the hearing on their summary judgment motion established intestate's contributory negligence as a matter of law, since defendants did not plead contributory negligence as required by G.S. 1A-1, Rule 8(c); furthermore, considering the mental retardation of intestate, the evidence did not establish contributory negligence as a matter of law.

APPEAL by plaintiff from *Browning, Judge.* Judgment entered 10 November 1975 in Superior Court, PITT County. Heard in the Court of Appeals 17 June 1976.

This is an action for the wrongful death of plaintiff's intestate. Pertinent allegations of the complaint are summarized as follows:

On or about 16 October 1973 defendant Smithson was employed by corporate defendant and at the time complained of was acting in the course and scope of his employment. On said date defendant Smithson requested intestate, who was mentally retarded, to carry a fuel oil ticket across a highway to intestate's uncle. Pursuant to the request intestate took the ticket, mounted his bicycle and started across the highway to where his uncle was working. As intestate was crossing the highway he was struck and killed by an automobile driven by defendant Harrington.

Defendant Smithson and the corporate defendant filed an answer denying material allegations of the complaint relating to them. Defendant Harrington filed a separate answer in which she denied material allegations of the complaint relating to her and pleaded contributory negligence.

Thereafter, defendant Smithson and corporate defendant moved for summary judgment pursuant to Rule 56. Defendant Harrington filed a similar motion. Following a hearing the trial court allowed the motions and from judgments dismissing the actions, plaintiff appealed.

The record on appeal was filed on 29 March 1976. On 30 April 1976 this court allowed plaintiff's motion to withdraw the appeal as to defendant Harrington.

James, Hite, Cavendish & Blount, by Robert D. Rouse III, for plaintiff appellant.

Smith, Anderson, Blount & Mitchell, by C. Ernest Simons, Jr., for defendant appellees.

BRITT, Judge.

The sole question presented is: Did the trial court err in entering summary judgment as to defendant Smithson and the corporate defendant? We hold that it did.

Defendants are entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, showed that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. G.S. 1A-1, Rule 56. Summary judgment is an extreme remedy and is appropriate only where no genuine issue of material fact is presented. *Long v. Long*, 15 N.C. App. 525, 190 S.E. 2d 415 (1972).

It is only in exceptional negligence cases that summary judgment is appropriate because the rule of the prudent man or other standard of care must be applied, and ordinarily the jury should apply it under appropriate instructions from the court. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972); *Kiser v. Snyder*, 17 N.C. App. 445, 194 S.E. 2d 638 (1973), *cert. denied*, 283 N.C. 257, 195 S.E. 2d 689 (1973); *Roberts v. Whitley*, 17 N.C. App. 554, 195 S.E. 2d 62 (1973).

Viewed in the light most favorable to plaintiff, the depositions, affidavits, and other materials presented at the hearing tended to show:

[1] On the day in question intestate, a retarded fourteen-year-old boy, lived with his father, grandmother, and sister near a paved highway in rural Pitt County. Intestate could not read or write and had a serious impediment in his speech. He could, however, ride a bicycle. His uncle, W. R. Haddock, lived a short distance away, on the opposite side of the highway. The speed limit on the highway was 55 m.p.h.

Defendant Smithson drove a fuel oil delivery truck for the corporate defendant. Prior to the day in question he had delivered fuel oil to the homes of intestate's father and uncle many times. On those occasions he would see and talk with intestate and they had become good friends. Defendant Smithson knew that intestate was retarded. When defendant Smithson would deliver oil at intestate's home he would give intestate the delivery ticket and intestate would take it to his grandmother.

On the day in question defendant Smithson was delivering oil to the uncle's home. During the course of the delivery intes-

tate came up on a bicycle and proceeded to talk with Smithson. Intestate's uncle was across the highway working on a tractor or piece of equipment. When Smithson finished delivering oil, he made out a ticket, handed it to intestate, and told him to take it to his uncle. While attempting to ride the bicycle across the highway to where his uncle was, a car driven by defendant Harrington at about 55 m.p.h., struck intestate and killed him. Intestate had been told by his father and other members of the family on numerous occasions not to ride a bicycle on the highway.

We think the evidence was sufficient to raise a jury question with respect to the negligence of defendant Smithson, which negligence, if any, was imputable to the corporate defendant.

[2] Defendant Smithson and the corporate defendant argue that the materials presented at the hearing establish contributory negligence on the part of intestate as a matter of law and for that reason summary judgment was proper. We disagree.

In the first place, these defendants did not plead contributory negligence as required by G.S. 1A-1, Rule 8(c). It is true that defendant Harrington pleaded it, but these defendants, having filed a separate answer, cannot take advantage of an affirmative defense pleaded by defendant Harrington. Furthermore, considering the mental retardation of intestate, we do not think the materials established contributory negligence as a matter of law.

Finally, defendant Smithson and the corporate defendant cross assign as error the admission and consideration of an affidavit made by plaintiff's attorney. Assuming, *arguendo,* that the affidavit was improper, we think the other materials presented at the hearing were sufficient to establish genuine issues of material fact.

For the reasons stated, the summary judgment in favor of defendant Smithson and the corporate defendant is

Reversed.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. ERNEST DUPREE AND TONY TERRY

No. 754SC891

(Filed 21 July 1976)

1. **Criminal Law §§ 89, 95— corroborative evidence — no limiting instruction when evidence admitted**

The trial court did not err in failing to instruct the jury on the purpose of corroborative evidence at the time of its admission where the court thereafter gave limiting instructions in its charge to the jury.

2. **Criminal Law § 112— instructions on reasonable doubt**

The charge of the court, when read contextually, did not limit the question of reasonable doubt to the evidence of the case but made it clear that lack of evidence could be considered by the jury.

3. **Criminal Law § 114— instructions — witness as accomplice — no expression of opinion**

The trial court's instruction that a State's witness "is what the court will classify as an accomplice" did not constitute an expression of opinion as to the guilt of defendants when it is considered with the court's further instructions on defendants' contentions that they were not accomplices and on the duty of the jury to scrutinize the testimony of the witness if it found he was an accomplice.

ON *writ of certiorari* to review judgments of *Perry Martin, Judge,* entered 10 January 1975, in Superior Court, ONSLOW County. Heard in the Court of Appeals 18 February 1976.

Defendants were charged in a bill of indictment with armed robbery. After entering a plea of not guilty they were tried and found guilty as charged. The State's evidence tended to show that Alvin Sliger was in a phone booth making a call when he was joined by a man he identified as Jarvis Carr. Carr pulled a knife on Sliger and demanded his money. Sliger resisted and Carr pointed to a man outside the booth saying that he had a gun. The man outside was identified as the defendant Ernest Dupree. Sliger gave Carr his money after which Carr and Dupree ran away. Sliger followed them in his automobile until he saw that they were headed for a parked vehicle, with a third man in the driver's seat. Dupree jumped into the vehicle; Carr continued running. Sliger then rammed into the rear of the vehicle with his own automobile. The vehicle took off. Sliger chased the automobile for a while, got the license plate number, and called the police.

Jarvis Carr testified for the State. He stated that Ernest Dupree was the man inside the phone booth and that he waited outside the booth. He identified the man who was driving the car as the defendant Tony Terry and added that after the robbery, Terry, Dupree and he returned to their apartment and divided the money.

Dupree testified that Carr had stated that he needed to make a phone call and asked to be let out of the car as they went by the booth. Carr asked Dupree to go with him, which Dupree did. Dupree did not know Carr's intention until they got to the phone booth and Carr stepped inside. Dupree panicked and started to run away but then returned. By this time Carr had taken the money and the two men ran off together. Tony Terry testified that he did not know what was happening until the robbery was completed. He stated they never discussed robbing anyone.

On rebuttal the State offered evidence tending to show that Terry and Dupree did have prior knowledge of what transpired on the evening in question.

The defendants appealed from judgments imposing sentences of imprisonment.

Attorney General Edmisten, by Assistant Attorney General Charles M. Hensey, for the State.

Edward G. Bailey, for defendants.

MARTIN, Judge.

[1] Defendants first contend that the court erred in failing to instruct the jury with regard to the nature and character of corroborative evidence immediately upon its admission. "Although a preferable procedure would have been for the court to give the requested instruction at the time the request was made and in conjunction with the admission of this evidence," *State v. Branch*, 288 N.C. 514, 534, 220 S.E. 2d 495, 509 (1975), no prejudicial error was committed here since the court, in its charge, correctly instructed the jury to limit the proffered testimony to corroborative purposes. The record shows that the purpose for which the evidence was being received was announced in the presence of the jury by defense counsel. The judge agreed with his request for an instruction and agreed to give the requested instruction in his final charge, which he

did. The instruction having been given, this assignment of error is overruled.

Defendants next contend that the court erred in overruling their motions for nonsuit. We find no merit in this contention. Considering the evidence in the light most favorable to the State, it is apparent that there was sufficient evidence for the jury to consider in reaching its findings and verdicts. *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156 (1971).

[2] The defendants' third contention is that the court erred in its charge as to the definitions of reasonable doubt. They contend the court failed to charge that reasonable doubt can arise from a lack of evidence. In the recent case of *State v. Butler,* 21 N.C. App. 679, 205 S.E. 2d 571 (1974), Judge Campbell wrote on this point as follows:

> "No error was committed in the instant case for the judge did not charge 'that a reasonable doubt is a doubt based upon reason and common sense and growing out of the evidence in the case.' It is when those words are used that it is error not to go further and add 'or the lack of evidence or from its deficiency.'"

In the instant case the judge charged the jury:

> "A reasonable doubt as that term is employed in the administration of criminal law would be an honest substantial misgiving. A misgiving ordinarily generated by the insufficiency of the evidence and an insufficiency which failed to satisfy your conscience and reason as to the guilt of the accused."

The charge, read contextually, did not limit the question of reasonable doubt to the evidence of the case. The charge made it clear that lack of evidence could be considered by the jury. Moreover, the judge thoroughly explained the reasonable doubt standard. The instruction is free from prejudicial error.

[3] Finally, defendants argue that the trial judge, in his charge to the jury, expressed an opinion as to the guilt of defendants by calling the State's witness Carr an accomplice of the defendants. When restating the testimony of Carr, the judge said:

> "Mr. Carr testified in this case and Mr. Carr is a defendant but he is not on trial before this jury. He is what the

court will classify as an accomplice and I will describe that to you in some greater detail later on."

Defendants contend they were prejudiced by this statement.

Following his restatement of the evidence, the judge gave instructions on credibility, the manner in which the jury was to consider the evidence and how the jury was to consider the testimony of the defendants. At this point, as part of the charge concerning the credibility of defendants as witnesses, the judge carefully pointed out defendants' contentions that they were *not* accomplices. He defined the term "accomplice," discussed the manner in which the jury should treat the testimony of an accomplice, and added:

> " . . . Mr. Carr is not on trial with these defendants. If you find that the witness [Mr. Carr] was an accomplice you shoud likewise examine his testimony with care and caution.
>
> *If* after doing so, however, you believe his testimony then you should give it the same credibility that you would any other believable evidence which you have heard in this case." (Emphasis added.)

Finally, the judge was careful to state that he had no opinion in the case. Taken in their totality, the judge's instructions do not amount to prejudicial error.

The defendants had a fair trial free of prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

IN THE MATTER OF: SHELBY JANE McMILLAN AND ABE McMILLAN

No. 7516DC1000

(Filed 21 July 1976)

Infants § 11— children kept out of public school — "neglected" children

Children whose parents wilfully refused to allow them to attend school because the children were not taught about Indians, Indian heritage and culture in the school were "neglected" within the meaning

of G.S. 7A-278(4), since it is fundamental that a child who receives proper care and supervision in modern times is provided a basic education, and the parents in this case did not provide their children with any alternative mode of educational programs.

APPEAL by respondents from *McLean, Judge.* Judgment entered 14 August 1975 in District Court, ROBESON County. Heard in the Court of Appeals 18 March 1976.

By petition the Robeson County Department of Social Services [Petitioner] alleged that the thirteen year old Shelby McMillan and ten year old Abe McMillan were neglected children under G.S. 7A-278(4). Evidence established that neither of the two children had enrolled in or attended school for the entire 1974-1975 school term.

McMillan, the father, testified that he was an Indian and that he would not send his children to school because they were not taught about Indians and Indian heritage and culture. He stated that he had previously served a thirty day jail sentence for encouraging his children to be absent from school unlawfully.

The court concluded that the juveniles were neglected children within the meaning of G.S. 7A-278(4) due to their parents' wilful refusal to allow them to attend school. From this order, the parents appealed to this Court.

Attorney General Edmisten, by Associate Attorney Isaac T. Avery III, for the State.

Seawell, Pollock, Fullenwider, Van Camp and Robbins, P.A., by Bruce T. Cunningham, Jr., for respondent appellants.

ARNOLD, Judge.

It is unchallenged, and the court found, that Shelby and Abe McMillan were "well fed, clothed, and cared for except for their lack of academic instruction." The court concluded that the children "are neglected within the meaning of G.S. 7A-278(4) on account of the wilful failure and refusal" of their parents "to send said children to school."

The issue presented in this appeal is whether children whose parents wilfully refuse to allow them to attend school may be "neglected" within the meaning of G.S. 7A-278(4). A child is neglected, as defined in that statute, when he or she

does not "receive proper care or supervision or discipline . . . , or who has been abandoned, or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare. . . . "

We reject appellants' argument that the court exceeded its authority in this matter. They contend that the proceeding was brought to compel compliance with the compulsory school attendance law, and that the exclusive means to enforce compulsory school attendance is G.S. 115-166. That statute provides that "No person shall encourage, entice or counsel any such child [between the ages of seven and sixteen] to be unlawfully absent from school." Violation of G.S. 115-166 is a misdemeanor. G.S. 115-169.

The purpose of G.S. 115-166 is to prevent those in charge or control of children from encouraging or enticing said children to be absent from school unlawfully. The purpose of Article 23 of Chapter 7A is set forth in G.S. 7A-277:

> "The purpose of this Article is to provide procedures and resources for children within the juvenile jurisdiction of the district court which are different in purpose and philosophy from the procedures applicable to criminal cases involving adults. These procedures are intended to provide a simple judicial process to provide such protection, treatment, rehabilitation or correction as may be appropriate in relation to the needs of each child subject to juvenile jurisdiction and the best interest of the State. The intent of this Article is to assure that, where possible, the court will arrange for the available community resources to be utilized to strengthen the child's family relationships in order to avoid removal of the child from his own home or community. Therefore, this Article should be interpreted as remedial in its purposes to the end that any child subject to the procedures applicable to children in the district court will be benefitted through the exercise of the court's juvenile jurisdiction."

In the instant case the disposition of the neglect petition is coincident with the policy of G.S. 115-166 that children between the ages of seven and sixteen attend school. However, the essence of the petition is not to enforce the compulsory school attendance law but to determine and provide for the needs of the children.

It was said in *Tucker v. Tucker,* 288 N.C. 81, 216 S.E. 2d 1 (1975), that the natural and legal right of parents to the custody, companionship, control and bringing up of their children is not absolute. It may be interfered with or denied for substantial and sufficient reason, and it is subject to judicial control when the interest and welfare of the children require it.

We do not accept appellants' position that a deep-rooted conviction for Indian heritage is on an equal constitutional plane with religious beliefs and thus protected by the First Amendment. This case is not like the one cited by appellants, *Wisconsin v. Yoder,* 406 U.S. 205, 32 L.Ed. 2d 15 (1972), which dealt with religious beliefs of the Amish. There is no showing that Shelby and Abe McMillan receive any mode of educational programs alternative to those in the public school. There is also no showing that the Indian heritage or culture of these children will be endangered or threatened in any way by their attending school.

The parents of Shelby and Abe McMillan wilfully refused to permit them to attend the public schools because those schools do not teach the particular heritage and culture the parents deem appropriate. Moreover, the parents do not provide any sufficient alternative education or training for these children. In our opinion the court exercised its control to interfere with the natural right of the parents in the best interest and welfare of the children.

It is fundamental that a child who receives proper care and supervision in modern times is provided a basic education. A child does not receive "proper care" and lives in an "environment injurious to his welfare" when he is deliberately refused this education, and he is "neglected" within the meaning of G.S. 7A-278(4). The trial court did not err in so finding, and the order is

Affirmed.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. DONALD TYRONE VANDERHALL

No. 7618SC144

(Filed 21 July 1976)

1. **Jury § 2; Criminal Law § 101— remarks in prior case in jury's presence — no prejudice to defendant**

The trial court did not err in denying defendant's motion to dismiss all jurors and for a special venire to try him because of a colloquy between counsel for another defendant and the trial court concerning that defendant's failure to testify, all of which took place in the trial immediately preceding defendant's and which took place in the jurors' presence, since there was no showing that any juror was adversely affected by the remarks, if any juror in fact heard them, defendant did not request that the judge examine the jurors to determine whether they heard the remarks and, if so, what impression they made, and defendant did not request the trial judge to give a curative instruction to the jurors.

2. **Criminal Law § 35— offense committed by another — competency of evidence**

In a prosecution for felonious larceny where the evidence tended to show that defendant took four suede coats from Sears, the trial court did not err in refusing to allow defendant's witness to testify that on the day of the alleged larceny two men other than defendant were near the Sears store in possession of three suede coats and tried to sell one to the witness, since, in order to be competent, evidence that the crime was committed by another must point unerringly to the latter's guilt.

3. **Criminal Law § 73— third party's confession to crime — hearsay**

Ordinarily, testimony of a voluntary confession of a third party that he committed the crime of which defendant is accused is incompetent as hearsay.

APPEAL by defendant from *Albright, Judge.* Judgment entered 24 October 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 25 May 1976.

Defendant was charged in a bill of indictment, proper in form, with felonious larceny. The State's evidence tends to show that during the lunch hour on 22 October 1974, defendant took four suede coats from the men's department of Sears, Roebuck & Co. at 101 South Wrenn Street, walked out the door, and drove away in an automobile which had its license plate covered with brown paper. The four coats had a value of approximately $235.00. The clerk on duty recognized defendant from having seen him in the store on several occasions.

Defendant offered evidence which tended to show that after defendant had been arrested, the State's witness said that defendant was not the person who stole the coats.

The jury found defendant guilty of nonfelonious larceny, and he was sentenced to confinement for a term of twenty-four months.

Attorney General Edmisten, by Associate Attorney Wilton E. Ragland, Jr., for the State.

Assistant Public Defender Fred Lind for the defendant.

BROCK, Chief Judge.

[1] During the process of selecting a jury for the trial of the charge against defendant, a jury in a previously tried case *(State v. Morrison)* came into court and returned a verdict of guilty. Counsel for Morrison made statements to the court in regard to punishment. While the statements of counsel for Morrison were being made, the prospective jurors for this defendant were seated in the courtroom, twelve in the jury box and others in the spectator section. Counsel for Morrison stated to the judge that he had declined to allow his client to testify because of his lengthy criminal record. The trial judge made no remark upon this point, although he did state that he thought counsel for Morrison had adequately and competently represented Morrison.

This appealing defendant (Vanderhall) moved to dismiss all jurors and for a special venire to try him because of the colloquy between counsel for Morrison and the trial judge. Defendant argues that he was prejudiced because he elected not to testify and these jurors assumed that it was because he too had a lengthy criminal record. His argument is not persuasive.

There is no showing that any juror was adversely affected by the remarks, if any juror in fact heard them. Defendant made no request that the judge examine the jurors to determine whether they heard the remarks and, if so, what impression they made; and defendant did not request the trial judge to give a curative instruction to the jurors. There is no showing that defendant questioned the prospective jurors in this regard or otherwise determined that any juror heard and was influenced to the prejudice of this defendant by the remarks. Clearly the trial of a defendant cannot be conducted in a

vacuum. We must presume that jurors abide by their oaths and that they follow the instructions of the trial court in reaching a verdict. No exception has been taken to the instructions given the jury by the trial court; consequently, the instructions are not included in the record on appeal. We therefore presume that the trial judge fully and correctly instructed the jury upon its duties. This assignment of error is overruled.

[2] Defendant next argues that the trial judge committed prejudicial error in refusing to allow defendant's witness to testify that on the day of the alleged larceny two men other than defendant were near the Sears, Roebuck & Co. store in possession of three suede coats and tried to sell one to the witness. Such testimony had little probative value. "In order to be competent, evidence that the crime was committed by another must point unerringly to the latter's guilt." 2 Strong, N. C. Index 2d, Criminal Law, § 35. The testimony was properly excluded.

[3] Defendant also argues that the trial judge committed prejudicial error in refusing to allow defendant's witness to testify that one of the men with the three suede coats later told the witness that defendant (Vanderhall) "had been charged incorrectly." Ordinarily testimony of a voluntary confession of a third party that he committed the crime of which defendant is accused is incompetent as hearsay. *State v. English,* 201 N.C. 295, 159 S.E. 318 (1931). The proffered testimony in the present case was unclear and had little probative value. Even if this statement could be considered an extrajudicial confession by the declarant, it does not rise to the degree of reliability required to support a due process argument. *See Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed. 2d 297 (1973). This assignment of error is overruled.

Defendant's remaining assignments of error are predicated upon those discussed above and are therefore overruled. In our opinion defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

EDITH MAE ROBERTS v. GRADY FETSER ROBERTS

No. 7621DC219

(Filed 21 July 1976)

Divorce and Alimony § 18— alimony pendente lite — half of joint savings account

The trial court erred in ordering a lump sum payment of $17,500 as alimony *pendente lite,* which is one-half the amount in the parties' joint saving account, since a determination of the rights to the joint savings account was a matter for final hearing on the merits and not for hearing on alimony *pendente lite.*

APPEAL by defendant from *Yeager, Judge.* Order entered 19 December 1975 in District Court, FORSYTH County. Heard in the Court of Appeals 10 June 1976.

Plaintiff wife brought this action wherein she seeks divorce from bed and board, alimony *pendente lite,* attorney fees, an accounting, and a restraining order. She alleged cruelty and indignities, and that defendant had withdrawn the money from the parties' joint savings account. Defendant counterclaimed for divorce from bed and board, and he alleged abandonment and indignities on behalf of plaintiff.

At the alimony *pendente lite* hearing plaintiff testified that defendant had offered indignities to her for years prior to 23 August 1975. On 21 August 1975, according to plaintiff, defendant grabbed her by the hair and shook her. On 23 August 1975 plaintiff left the family home and attempted suicide for which she was hospitalized for six weeks, and incurred a hospital bill for $5,000. Plaintiff stated that defendant harassed her while she was hospitalized, and demanded that she return home with him.

Plaintiff also testified that she had worked from the time of the parties' marriage in 1942 until 1974, and that she had contributed at least 80% of the $35,000 which had been in a joint banking account until defendant had recently withdrawn it and placed it into an account in his name. She testified that defendant received $510 each month as rent from a trailer park owned by the parties, $110 a month in rent from other properties which they own, plus $207 a month from the Veterans' Administration.

Defendant testified that he grabbed plaintiff and shook her because he was upset. He stated that eighty percent of the money in the savings account came from rentals owned by both parties, and that he was only receiving $300 a month from the trailer park because there were only ten trailers whereas there had been seventeen.

The court found that plaintiff was a dependent spouse, defendant was a supporting spouse, and that defendant had offered indignities to plaintiff and had constructively abandoned her. It was ordered, among other things, that plaintiff receive alimony *pendente lite* in the amount of $300 per month, and that she receive a lump sum payment of $17,500 as alimony *pendente lite.*

Defendant appealed.

Larry F. Habegger for plaintiff appellee.

White and Crumpler, by Melvin F. Wright, Jr., for defendant appellant.

ARNOLD, Judge.

The court ordered a lump sum payment of alimony *pendente lite* in the amount of $17,500, exactly one-half the amount in the parties' joint savings account. Defendant contends the trial court erred in ordering the lump sum payment since adjudication of the parties' respective rights in the joint account was not a proper matter to be settled at the hearing on alimony *pendente lite.* We agree.

The purpose of alimony *pendente lite* is to provide the dependent spouse with reasonable living expenses during the pendency of litigation. As stated by Higgins, J., in *Sguros v. Sguros,* 252 N.C. 408, 412, 114 S.E. 2d 79 (1960): "A *pendente lite* order is intended to go no further than provide subsistence and counsel fees pending the litigation. It cannot set up a savings account in favor of the plaintiff. Such is not the purpose and cannot be made the effect of an order."

"Unlike the question of subsistence *pendente lite* or temporary child custody, the matter of disputed ownership of considerable assets will turn on determination made in the context of a final hearing on the merits of all the claims and assertions." (Emphasis added.) *Guy v. Guy,* 27 N.C. App. 343, 348,

219 S.E. 2d 291 (1975). In this case the court acted prematurely. A determination of the rights to the joint savings account was a matter for final hearing on all the merits, and not for hearing on alimony *pendente lite.*

Defendant's second argument that the court erred in making findings of fact not supported by the evidence is without merit.

That portion of the court's order directing payment of alimony *pendente lite* to plaintiff in a lump sum of $17,500 is vacated. The remaining portions of the order are affirmed.

Vacated in part.

Affirmed in part.

Chief Judge BROCK and Judge PARKER concur.

L. REGINALD CAROON v. L. J. EUBANK, JR., TRUSTEE, AND FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF NEW BERN, INC., ORIGINAL DEFENDANTS v. JAMES A. EZZELL, ADDITIONAL DEFENDANT

No. 763SC31

(Filed 21 July 1976)

Rules of Civil Procedure § 41— voluntary dismissal — disposition of funds held by clerk

In an action to determine the ownership of certain real property where the evidence tended to show that plaintiff entered the highest bid at a foreclosure sale and tendered the amount of his bid to the trustee, the trustee refused to deliver a deed to plaintiff because the debtor paid the note secured by the property in question within ten days of the foreclosure sale, the trustee paid the amount which plaintiff had tendered into the court with the request that the clerk hold the funds until the question of whether plaintiff was entitled to the deed was resolved, and plaintiff then filed a motion of dismissal of his action without prejudice and at the same time filed a motion asking for the return of the money held by the clerk, the plaintiff was entitled to take a voluntary dismissal without prejudice, and the trial court's order prohibiting release of the funds unless plaintiff abandoned his claim is reversed.

APPEAL by plaintiff from *Lanier, Judge.* Judgment entered 17 November 1975 in Superior Court, PAMLICO County. Heard in the Court of Appeals 15 April 1976.

Plaintiff brought this action to determine the ownership of certain real property upon which plaintiff was hightest bidder at a foreclosure sale held by defendant Eubank as Trustee under a deed of trust from Bayboro Tire and Retreading Company securing an indebtedness due First Federal Savings & Loan Association. Plaintiff alleged that he had bid $45,000 for the property; that no increased bid was filed within 10 days of the sale; that the sale had been confirmed by the Clerk; that plaintiff had tendered the $45,000 to the Trustee who accepted it but refused to deliver a deed to plaintiff. First Federal answered averring that its only interest in the matter was to receive the balance due on the note of Bayboro Tire & Retreading Company and that the debtor had paid the note prior to the expiration of the 10-day period and had requested First Federal to transfer the note and deed of trust to James Ezzell. This First Federal did. Defendant Trustee filed answer averring that he had refused to deliver a deed to plaintiff upon being informed that the debt had been paid within the 10-day period; that he had returned the $45,000 to plaintiff's attorney; and that the order of confirmation was improvidently signed by the Clerk. James Ezzell, having been brought in the action as a defendant, answered averring that the payment of the debt secured by the deed of trust was within 10 days of the sale and the action of the Trustee in refusing to execute and deliver a deed was proper. The Trustee paid the $45,000 into court with the request that the Clerk hold the funds until the question of whether plaintiff is entitled to a deed is resolved. There is nothing in the record which would resolve the apparent ambiguity in the Trustee's averment that he had turned the $45,000 over to plaintiff's attorney and his subsequent turning it over to the Clerk as stakeholder. Plaintiff then filed a notice of dismissal of his action without prejudice and at the same time filed a motion asking for the return of the $45,000.

James A. Ezzell filed an answer to the motion in which he takes the position that the Court should refuse to release the funds to plaintiff until "all matters and things affecting title to the real property in question have been determined"; or in the alternative, that plaintiff be paid the funds, that the order of confirmation be vacated and plaintiff declared to have no further right, title, or interest in the land. By answer to the motion, First Federal Savings & Loan Association takes the position that plaintiff should not be entitled to have the funds

released to him unless he agrees to a final dismissal of the action. The Trustee by his answer takes the same position.

The court, after considering the entire record, consisting of the pleadings and affidavits, denied the motion concluding "that said funds should not be relased until there is a determination of the matters and things in controversy between the parties in this action; and that, unless the plaintiff will abandon such claim, said deposit should not be released." From entry of the order, plaintiff appealed.

Ward, Tucker, Ward & Smith, P.A., by Michael P. Flanagan, Jr., for plaintiff appellant.

Barden, Stith, McCotter & Stith, by Laurence A. Stith, for original defendant appellees.

Lee, Hancock and Lasitter, by C. E. Hancock, Jr., for additional defendant appellee.

MORRIS, Judge.

Plaintiff contends that the trial court erred in its entry of judgment denying his motion for return of funds made under G.S. 1A-1, Rule 41(a)(1), which provides that plaintiff may take a voluntary dismissal of his case without order of court by filing a notice of dismissal before plaintiff rests his case.

> "Under the former practice a judgment of voluntary nonsuit terminated the action and no suit was pending thereafter on which the court could make a valid order. 7 Strong, N. C. Index 2d, Trial, § 30, p. 317. We think the same rule applies to an action in which plaintiff takes a voluntary dismissal under G.S. 1A-1, Rule 41(a)(1)." *Collins v. Collins*, 18 N.C. App. 45, 50, 196 S.E. 2d 282 (1973).

Sutton v. Sutton, 18 N.C. App. 480, 197 S.E. 2d 9 (1973). See also *In Re Estate of Nixon*, 2 N.C. App. 422, 163 S.E. 2d 274 (1968).

There are undoubtedly unresolved issues with respect to this matter. Nevertheless, plaintiff cannot be made to choose which remedy he will pursue before he takes a voluntary dismissal. Nor can he be forced to take a dismissal with prejudice under the circumstances here. To hold otherwise would be to say that G.S. 1A-1, Rule 41(a)(1) is without efficacy. The court's order

recited that the matter before him was a motion "to release from the treasury of the Clerk of the Superior Court Division in Pamlico County, *and where said action is pending,* funds deposited as the amount of a bid at the foreclosure sale of certain properties in Pamlico County." (Emphasis supplied.) Plaintiff filed his notice of dismissal prior to filing the motion. At the time the motion was filed, no action was pending. Plaintiff is entitled to take a voluntary dismissal without prejudice and proceed thereafter in such a manner as he may be advised.

Reversed.

Judges PARKER and MARTIN concur.

ALBERT T. CANNADY v. NORTH CAROLINA WILDLIFE RESOURCES COMMISSION AND THE COMMISSIONERS: ROSCOE D. STANLEY, W. K. ANDERSON, WILLIAM C. BOYD, WALLACE E. CASE, ROY A. HONEYCUTT, CLYDE P. PATTON, HENRY E. MOORE, JAY WAGNER, DEWEY E. WELLS, AND B. E. WILSON

No. 763SC234

(Filed 21 July 1976)

Animals § 7— prohibiting caging of black bears — constitutionality of statutes

Statutes prohibiting the caging of a black bear and allowing possession of a black bear only without caging under conditions simulating a natural habitat upon approval of the Wildlife Resources Commission do not provide for the taking of property without just compensation and do not violate due process and equal protection. G.S. 19A-10 *et seq.*

APPEAL by plaintiff from *Lanier, Judge.* Judgment signed 26 November 1975 in Superior Court, CRAVEN County. Heard in the Court of Appeals 14 June 1976.

Plaintiff has owned a black bear for several years. Article 2 of Chapter 19A of the General Statutes became effective 1 July 1975. The act makes it unlawful to buy, sell or possess a black bear (Ursus americanus) except as provided by the article.

Plaintiff started this action to restrain defendant from enforcing the act against him and alleged that the article was unconstitutional on its face and as applied against him.

The case was heard by the judge without a jury. From judgment dismissing the action, plaintiff appealed.

Attorney General Edmisten, by Deputy Attorney General Millard R. Rich, Jr., for the State.

Ernest C. Richardson III, for plaintiff appellant.

VAUGHN, Judge.

The act in question is as follows:

§19A-10. *Unlawful to buy, sell or enclose (except as provided) black bear.* Except as otherwise provided in applicable statutes, it shall be unlawful for any person to buy or sell black bears or for any person, firm or corporation to possess or keep any black bear (Ursus americanus) in any enclosure, pen, cage, or other place or means of captivity except as hereinafter provided. (1975, c. 56, s. 1.)

§19A-11. *Inapplicable to bona fide zoos, etc.* The provisions of this Article shall not apply to bona fide zoos which are operated by federal, State, or local governmental agencies, or to educational institutions in which black bears are kept or exhibited as part of a bona fide course of training or research in the natural sciences, or to black bears held without caging under conditions simulating a natural habitat, the development of which is in accord with plans and specifications developed by the holder and approved by the Wildlife Resources Commission. (1975, c. 56, s. 2.)

§19A-12. *Possession of black bear on July 1, 1975; surrender of bear; modification of facilities; forfeiture.* Any person, firm or corporation in possession of a black bear on July 1, 1975, under an existing permit issued by the Wildlife Resources Commission, where the conditions under which such black bear is held are in violation of this Article, may immediately surrender such black bear and such permit to the Wildlife Resources Commission which shall compensate such person, firm or corporation in the amount actually paid for such bear not to exceed the sum of one hundred dollars ($100.00) for any one bear. In lieu of surrendering such black bear and such permit, any such person, firm or corporation may give immediately written notice to the Wildlife Resources Commission that plans and

specifications for facilities to hold such bear without caging under conditions simulating a natural habitat will be submitted to the Commission for approval within 30 days thereafter. In the event such plans and specifications are not submitted within the time thus limited, or they are disapproved by the Commission, or the facilities are not completed in accordance therewith within 60 days after approval by the Commission, continued possession of a black bear by such person, firm or corporation after any of such events shall constitute a violation of the provisions of this Article, and any such black bear shall be forfeited to the Wildlife Resources Commission without compensation. (1975, c. 56, s. 3.)

§19A-13. *Violation of Article.* Violation of the provisions of this Article shall constitute a misdemeanor punishable by a fine of not less than five hundred dollars ($500.00) or by imprisonment for not less than 90 days. (1975, c. 56, s. 4.)

§19A-14. *Enforcement of Article.* Law enforcement officers of the Wildlife Resources Commission and all other peace officers are authorized and empowered to enforce the provisions of this Article. (1975, c. 56, s. 5.)"

In essence, plaintiff contends that the act is unconstitutional because: (a) it provides for the taking of property of the plaintiff without just compensation (b) it provides for the taking of the property of plaintiff without due process of law (c) it does not provide equal protection under the state and federal constitutions.

The authority of the State to provide for the protection of animals has long been recognized. The purpose of the statute in question is to provide for the protection of bears and to require that, when they are kept in captivity, adequate standards for their care and comfort be maintained. There was absolutely no evidence that the standards promulgated by the Wildlife Resources Commission were unreasonable. There was, therefore, no "taking" of private property so as to involve "just compensation" or "due process." Although the statute does provide compensation up to $100.00 for those electing to surrender their bears, one is not required to give up his bear if he elects to comply with the minimum standards for keeping them in captivity.

We also conclude that plaintiff's argument that the act is unconstitutional because it denies him equal protection of the laws is without merit. Plaintiff bases his argument on the exemptions from the provisions of the article set out in G.S. 19A-11. We hold that there is a rational basis for excepting bona fide zoos operated by governmental agencies from the provisions of the act.

The judgment of the trial court is affirmed.

Affirmed.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. WALTER SPEIGHT BURRUS

No. 761SC17

(Filed 21 July 1976)

Automobiles § 129— driving under the influence — lesser included offense of reckless driving — failure to instruct — error

In a prosecution for driving under the influence of intoxicating liquor where the evidence was sufficient to show that defendant operated a motor vehicle upon a highway after consuming such quantity of intoxicating liquor as directly and visibly affected the operation of said vehicle, the trial court erred in failing to instruct the jury that they could find defendant guilty of the lesser included offense of reckless driving as defined in G.S. 20-140(c).

APPEAL by defendant from *Small, Judge.* Judgment entered 15 October 1975 in Superior Court, CAMDEN County. Heard in the Court of Appeals 15 April 1976.

Defendant was charged by warrant with driving under the influence of intoxicating liquor. Evidence for the State tended to show that on the night of 1 May 1975 Patrolman J. C. Strickland was driving on U. S. Highway 158. At a particular point on the highway he observed a number of large orange warning barrels, which were standing in place and served to block off a construction area. One side of a two section bridge was closed to traffic and barricaded by the barrels. Strickland returned to the area shortly after midnight and observed that three of the 50-gallon barrels had been knocked over and that a Corvette

was stopped on the shoulder of the highway with a barrel caught under the front of the vehicle. The rear of the vehicle was resting on the highway. Defendant was slumped over the steering wheel of the car. Strickland attempted to arouse defendant by knocking on the car window and the top of the car. When defendant did not respond, Strickland opened the door and shook defendant, finally awakening him. Defendant had poor balance, slurred speech and a strong odor of an intoxicating beverage on his breath. Strickland arrested defendant and took him to the Tri-County jail in Elizabeth City and requested that he take a breathalyzer test. Defendant refused to take the test. Strickland did have defendant perform a series of coordination and agility tests, the results of which revealed poor balance. These results and defendant's physical symptoms, combined with Strickland's previous observations of defendant at the scene of the accident, led Strickland to conclude that defendant was under the influence of an intoxicating beverage.

Defendant testified and recounted his actions during the day of 1 May. He testified that he took medication for his heart condition that morning, went to his office in the afternoon, and on the way home from the office drank about half of a beer. He had another beer before dinner, and after dinner left to go back to his office. This was about 9:00 p.m. On the way to the office he encountered severe chest pains and took more heart medication. He stopped at Dunn's gas station and rested, then had a beer with Dunn. That is the last thing defendant remembers until he awoke in jail. Dunn confirmed that defendant had been sick when he stopped at his gas station and that he and defendant drank a beer after defendant felt better. He testified that defendant left after drinking the beer and that in his opinion defendant was not under the influence.

From a verdict of guilty and judgment entered thereon, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Ralf F. Haskell, for the State.

Twiford, Abbott, Seawell, Trimpi & Thompson, by O. C. Abbott and John G. Trimpi, for defendant.

MARTIN, Judge.

Defendant was found guilty of driving under the influence of intoxicating liquor, a violation of G.S. 20-138. Among his

assignments of error defendant contends that, while the court did instruct the jury upon the charge of driving under the influence, the court erred by not instructing the jury that they could find defendant guilty of the lesser included offense of reckless driving as defined in G.S. 20-140(c).

G.S. 20-140(c) provides that

> "Any person who operates a motor vehicle upon a highway or public vehicular area after consuming such quantity of intoxicating liquor as directly and visibly affects his operation of said vehicle shall be guilty of reckless driving and such offense shall be a lesser included offense of driving under the influence of intoxicating liquor as defined in G.S. 20-138 as amended."

The terms of this provision make clear the intent of the Legislature that the offense therein described shall be a lesser included offense of driving under the influence of intoxicating liquor. It is the duty of the court to apply the statute in a manner to effectuate the intent of the Legislature, irrespective of any opinion as to its wisdom, unless the statute exceeds the power of the Legislature under the Constitution. See *Peele v. Finch,* 284 N.C. 375, 200 S.E. 2d 635 (1973).

In the case at bar the testimony that defendant was under the influence of intoxicating liquor when Patrolman Strickland saw him, evidence of defendant's physical and mental condition, and the physical facts at the scene of the accident provide evidence indicating that defendant operated a motor vehicle upon a highway after consuming such quantity of intoxicating liquor as directly and visibly affected the operation of said vehicle, thereby satisfying the requisite elements of G.S. 20-140(c). This, combined with the legislative mandate that such offense is a lesser included offense of driving under the influence of intoxicating liquor as defined in G.S. 20-138, requires us to find that the trial court should have instructed the jury that they could find defendant guilty of the lesser included offense of reckless driving as defined in G.S. 20-140(c). Because of this error in the instructions to the jury, the decision of the trial court is reversed and a new trial is ordered.

We do not discuss defendant's remaining assignments of error since the questions may not recur upon a new trial.

New trial.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. PAUL MONROE CLARK

No. 762SC162

(Filed 21 July 1976)

Criminal Law § 51; Narcotics § 3— officer as expert in marijuana identification

The trial court did not err in finding that an officer was an expert in the identification of marijuana and in allowing the officer to give his opinion that green vegetable matter which he found on and about the person of defendant was marijuana where the officer testified that he had been an investigating officer in 60 or 70 cases involving marijuana, so identified by chemical analysis; he had a training course in marijuana identification of 30 hours at a technical school; he had seen it growing; and it has a distinctive odor when burning.

APPEAL by defendant from *Webb, Judge.* Judgment entered 12 December 1975, Superior Court, BEAUFORT County. Heard in the Court of Appeals 26 May 1976.

Defendant pled not guilty to the charge of possession of marijuana, a Schedule VI controlled substance.

Evidence for the State tends to show that on 27 April 1975, Officer Watson was forced to swerve his automobile as an oncoming car veered into Watson's lane of traffic. Watson turned around, began to follow the car and turned on his blue light and siren. As he did this, someone on the passenger's side of the car began to throw a green leafy substance from the car. When the car stopped, Officer Watson found defendant on the passenger side of the car holding a blue hat with a small quantity of marijuana in it. He was in a dazed condition and smelling of marijuana. A smoked marijuana cigarette, marijuana seed and plastic bags were found on the floorboard of the car around defendant's feet. In the opinion of Officer Watson defendant was under the influence of some narcotic drug.

Defendant's evidence tended to show that he had been drinking liquor but not smoking marijuana. From a verdict of guilty and sentence to prison, defendant appeals.

Attorney General Edmisten by Associate Attorney T. Lawrence Pollard for the State.

Leroy Scott for defendant appellant.

CLARK, Judge.

Defendant assigns as error the finding by the court that Officer Watson was an expert in the field of analyzing vegetable matter to determine if it is marijuana and in permitting him to identify as marijuana the vegetable matter found in and outside the car. The finding of the court was based on the testimony of Officer Watson that he had been an investigating officer in 60 or 70 cases involving marijuana, so identified by chemical analysis; that he had a training course in marijuana identification of 30 hours at Wilson Technical School; that he had seen it growing; and that when burning it had a distinctive odor. The competency of a witness to testify as an expert is addressed primarly to the discretion of the trial court, and its determination is ordinarily conclusive if supported by competent evidence. *State v. Moore,* 245 N.C. 158, 95 S.E. 2d 548 (1956). In *State v. Bullard,* 267 N.C. 599, 148 S.E. 2d 565 (1966), the defendant was charged with possession of marijuana and peyote. S.B.I. Agent Starling testified that he was a graduate of the Federal Bureau of Narcotics Advanced Training School; that for four years he had worked exclusively on narcotic investigation. He further testified that peyote produces "certain hallucinations type effects," and that marijuana "is a narcotic . . . and is a type of weed that distorts the senses." In holding this opinion evidence admissible, the court stated: "While the record does not show that the court held Mr. Starling to be an expert in this field, he undoubtedly qualifies as such."

Courts in other states have held admissible the testimony of a witness who has had prior experience with marijuana, that he knew its physical properties and that in his opinion it was marijuana. See 28 C.J.S., Drugs and Narcotics Supp., § 202, p. 297.

Who are experts? To be an expert it is enough that, through study or experience, or both, the witness has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject. 1 Stansbury, N. C. Evidence 2d, (Brandis Rev. 1973), § 133, p. 429.

It appears from the evidence in the case before us that the witness, Officer Watson, by training and experience acquired such skill in the identification of marijuana that he was qualified, and better so than the jury, to form an opinion that the green vegetable matter which he found on and about the person of the defendant was in his opinion marijuana.

The evidence supports the finding of the trial judge, and defendant has not shown abuse of his discretion.

There is no merit to defendant's other assignment of error that the State's evidence was insufficient to withstand his motion for a directed verdict of not guilty.

No error.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. CHARLES ANDREW LAMB, JR.

No. 7622SC257

(Filed 21 July 1976)

Criminal Law § 117— self-incriminating testimony by uncle of defendant — instruction on interested witness improper

In a prosecution for discharging a shotgun into an occupied dwelling, the trial court erred in instructing the jury to the effect that defendant's witness, being an uncle of defendant, was an interested witness and that his testimony should be carefully scrutinized, since the witness testified that he fired the shots into the dwelling, and his interest against self-incrimination was at least as strong as the bias which would incline him to testify in behalf of his nephew.

APPEAL by defendant from *Crissman, Judge*. Judgment entered 30 October 1976 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 17 June 1976.

Upon a plea of not guilty defendant was tried on a bill of indictment charging him with discharging a shotgun into a dwelling house occupied at the time by Van Byars, his wife and children. Evidence presented by the State tended to show:

On the night in question, Van Byars, his wife and several children were asleep in their home. Awakened by a loud noise,

Mrs. Byars arose from her bed, went to a window and saw a man holding a long gun standing outside the window. The man turned and ran but Mrs. Byars recognized him as the defendant, a cousin of her husband's. She awakened Mr. Byars and in a few minutes a deputy sheriff arrived after which they discovered holes in the screen and interior of the house made by shotgun pellets. After the deputy left, defendant and his uncle, Jimmy Lamb, drove up close to the house. Defendant called to Mr. Byars, cussed him for being a s.o.b., and admitted that he had tried to kill Byars earlier that night. There had been previous threats between defendant and Byars because the latter's brother had shot defendant's father. Defendant had been convicted of shooting the tires on the Byars' car and also of shooting his (defendant's) wife's former husband.

Defendant took the stand and denied shooting into the house. His uncle, Jimmy Lamb, testified that he shot into the house with a .12 gauge shotgun because Byars had said that he hoped defendant's father (Jimmy's brother) died as a result of being shot by Byars' brother.

The jury found defendant guilty as charged and from judgment imposing prison sentence of not less than six nor more than ten years, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Ralf F. Haskell, for the State.

Barnes and Grimes, by Jerry B. Grimes, and Cahoon and Swisher, by Robert S. Cahoon, for defendant appellant.

BRITT, Judge.

Defendant assigns as error the failure of the trial court to grant his motion for nonsuit. We find no merit in the assignment. While the evidence was conflicting, particularly with respect to the testimony of Mrs. Byars and statements she made to the officers immediately following the occurrence, the conflicts were for the jury to resolve and did not warrant nonsuit. 2 Strong, N. C. Index 2d, Criminal Law § 104.

Defendant assigns as error the court's instruction to the jury to the effect that his witness Jimmy Lamb, being an uncle of defendant, was an interested witness and that his testimony should be carefully scrutinized. In support of this assignment defendant relies primarily on *State v. Turner*, 253 N.C. 37, 116

S.E. 2d 194 (1960). Being of the opinion that the principle declared in *Turner* applies to this case, we sustain the assignment of error and hold that defendant is entitled to a new trial.

In *Turner,* defendant was tried on a warrant charging him with possession of illicit liquor for the purpose of sale. The State's evidence tended to show: Police officers with a search warrant went to defendant's home. Upon arrival they found no one there except defendant's fifteen or sixteen-year-old son. After reading the search warrant to him, they searched the premises and found a large quantity of illicit whiskey. Defendant denied knowledge of the whiskey being on his premises and presented as a witness his brother-in-law who had been living in the home about two weeks. The brother-in-law testified that the whiskey was his and that defendant knew nothing about it.

The trial court instructed the jury that the brother-in-law was an interested witness and that his testimony should be carefully scrutinized. In an opinion by Justice (later Chief Justice) Bobbitt, the Supreme Court awarded a new trial holding that under the facts in the case the instruction was erroneous since the interest of the witness against self-incrimination was at least as strong as the bias which would incline him to testify in behalf of a brother-in-law.

The record in the case *sub judice* discloses: Jimmy Lamb was called to the witness stand and when it appeared that he was going to testify that he did the shooting, the court in the absence of the jury warned the witness that anything that he said could be used against him; and, if he admitted the shooting, he would subject himself to having a bench warrant served on him and placed under immediate arrest. In spite of the warning, Lamb testified that he shot into the house.

It appears to us that the interest of the witness against self-incrimination in the instant case was even stronger than was true in *Turner;* therefore, the principle applied there must be applied here.

Since a new trial is ordered for the reasons above stated, we decline to discuss the other assignments of error brought forward and argued in defendant's brief.

New trial.

Judges HEDRICK and MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 JULY 1976

BOARD OF TRANSPORTATION v. PHELPS No. 7628SC142	Buncombe (71CVS2534)	Affirmed
HARRIS v. MOCK ET AL No. 7614SC79	Durham (73CVS3836)	Affirmed
MACON v. INSURANCE No. 7619SC220	Randolph (75CVS296)	Appeal Dismissed
STATE v. BARTON No. 7616SC259	Robeson (75CR16969) (75CR16970)	No Error
STATE v. BLANTON AND WIDEMON No. 7627SC229	Cleveland (74CR12891) (74CR12985)	No Error
STATE v. BOND No. 762SC240	Beaufort (75CR6156)	No Error
STATE v. BYRD No. 7628SC124	Buncombe (75CR13650)	No Error
STATE v. CARTER No. 762SC108	Beaufort (75CR3314)	No Error
STATE v. DALLAS No. 7627SC91	Lincoln (75CR3380)	No Error
STATE v. GEORGE No. 7627SC173	Cleveland (75CR2360)	No Error
STATE v. McKENZIE No. 7620SC75	Richmond (75CR3828)	No Error
STATE v. McKOY No. 765SC264	New Hanover (75CR16617)	No Error
STATE v. NORTON AND NORTON No. 764SC67	Onslow (75CR12232) (75CR12233)	No Error
STATE v. PARKER No. 7622SC147	Iredell (74CV3205)	Affirmed
STATE v. PURCELL No. 7611SC47	Harnett (75CR3078)	No Error
STATE v. WELBORN No. 7622SC77	Iredell (75CR8378)	No Error

STATE v. WHITTED No. 7614SC201	Durham (75CR18410) (75CR18411) (75CR18412) (75CR18434)	No Error
STATE v. WRAY AND WOODS No. 7627SC189	Cleveland (75CR1006) (75CR1008)	No Error
SULLIVAN v. SULLIVAN No. 765DC129	New Hanover (70CVD1901)	Vacated & Remanded
YOUNG v. YOUNG No. 7628DC137	Buncombe (75CVD2118)	Reversed & Remanded

FILED 21 JULY 1976

BAZEMORE v. JOHNSON ET AL No. 766DC127	Bertie (75CVD13)	Watson & Watson — No Error Johnson & Ruffin — New Trial on Issue of Agency
BYRD v. BYRD No. 7625DC175	Catawba (73CVD161)	Affirmed
CROSS v. BECKWITH No. 7510SC1056	Wake (69CVS5565)	New Trial
HOUSE OF CHEESE v. BD. OF TRADE No. 7614SC128	Durham (75CVS1761)	Affirmed
IN RE ADAMS No. 761SC226	Currituck (75J31)	Vacated & Remanded
IN RE HUTCHINS No. 7626DC239	Mecklenburg (75CVD8614)	Affirmed
McDANIELS v. McDOUGALD No. 7613DC188	Columbus (74CVD1567)	Affirmed
MOORE v. MOORE No. 7628DC102	Buncombe (75CVD1927)	New Trial
STATE v. AMBURGEY No. 764SC235	Onslow (75CR15064)	Affirmed
STATE v. BENNETT No. 7627SC224	Cleveland (75CR1459)	No Error
STATE v. BRIDGES No. 7627SC248	Gaston (75CR9473)	No Error

STATE v. BRYANT No. 767SC255	Nash (75CR532)	No Error
STATE v. DEWALT No. 7626SC131	Mecklenburg (75CR12971)	No Error
STATE v. DODD No. 764SC251	Onslow (75CR9724)	No Error
STATE v. EVERHART No. 7619SC109	Rowan (75CR2705)	No Error
STATE v. GODBEY No. 7622SC161	Davidson (75CR8345)	No Error
STATE v. THOMPSON No. 767SC187	Wilson (75CR3858) (75CR3857)	No Error
STATE v. TREADWAY No. 7628SC62	Buncombe (75CR19203)	No Error
STATE v. WHITE No. 7620SC268	Anson (75CR1998)	Affirmed
UTILITIES COMM. v. EDMISTEN No. 7610UC199	Util. Comm. (Docket E-13, Sub. 23)	Affirmed

BROADWELL REALTY CORPORATION v. J. HOWARD COBLE, SECRETARY OF REVENUE FOR THE STATE OF NORTH CAROLINA

No. 7610SC44

(Filed 4 August 1976)

Taxation § 26— franchise tax — installment sales — deferred profits — deduction for deferred income tax

A corporation using the installment method of accounting was entitled to have deferred income tax on installment sales deducted from deferred gross profit from installment sales in determining additions to "surplus" for the purpose of computing the corporation's franchise tax.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 28 October 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 5 May 1976.

Plaintiff filed its franchise tax return in time based upon its closing balance sheet for its fiscal year ended 31 October 1964 and paid the tax shown to be due. Defendant audited the return and assessed an additional tax in the amount of $213.98. Plaintiff paid this assessment on 24 March 1966 together with interest in the amount of $9.63 and brought this action under the provisions of G.S. 105-266.1 to recover the sum of $199.87, the amount plaintiff alleges was erroneously assessed, with interest thereon from the date of payment.

The parties are not in dispute with respect to the figures involved nor with respect to the chronology of events.

Plaintiff is in the business of constructing and selling residential dwellings. In so doing it was its custom to sell a house upon a down payment of an average of 4.8% of the contract sales price, the assumption by the purchaser of the outstanding first lien deed of trust, and the payment of the balance over a period of years (usually 20 to 30 years) with these deferred payments secured by a second lien deed of trust. The average first lien deed of trust secured a note for approximately 75% of the contract sales price, and plaintiff continued to be liable for the payment of the amount secured.

For income tax purposes, plaintiff reported income from these transactions under the installment method; i.e., profits on the sales were reported as taxable income in the year in which payments were received, and income tax on the transaction was paid only in the year in which payments were received.

On its books and records for the year in question, plaintiff showed deferred sales in the amount of $142,650.87. This amount represented the total gross profit on the installment contracts which plaintiff would collect in subsequent years. Plaintiff did not, however, include the $142,650.87 in its taxable base on the franchise tax return and, therefore, it was not included in the computation of plaintiff's franchise tax liability.

Upon audit of the return, defendant, by notice dated 17 January 1966, proposed an assessment of additional tax based on his determination that the plaintiff's taxable base should be increased by the total amount of the deferred sales. The determination was arrived at by defendant's including the amount of $142,650.87 in plaintiff's surplus.

Plaintiff sought a partial refund on the basis that the amount of deferred sales included in surplus by defendant should have been reduced by $72,923.12, the amount of federal and state income taxes which p'laintiff would be required to pay as payments were received on the deferred sales contracts. The claim for refund was denied and plaintiff brought this action to recover the tax it alleges was erroneously assessed.

The matter was heard by the court without a jury and judgment was entered for plaintiff. Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for J. Howard Coble, Secretary of Revenue for the State of North Carolina, appellant.

Biggs, Meadows, Batts & Winberry, by Frank P. Meadows, Jr., for plaintiff appellee.

MORRIS, Judge.

G.S. 105-122(b) provides that "[e]very such corporation taxed under this section shall *determine the total amount of its issued and outstanding capital stock, surplus and undivided profits;* no reservation or allocation from surplus or undivided profits shall be allowed other than for definite and accrued legal liabilities, except as herein provided; *taxes accrued,* dividends declared and reserves for depreciation of tangible assets as permitted for income tax purposes shall be treated as deductible liabilities." (Emphasis supplied.)

Defendant contends that since the income tax liability on the deferred sales is not a "definite and accrued legal liability,"

it can only be deducted if it comes within the exceptions noted and that it cannot qualify as "taxes accrued." We agree that the item is not technically "taxes accrued" as the term is generally understood. However, we do not think that is decisive of this case.

Under G.S. 105-122, the franchise tax return shall be based on facts and information " . . . as shown by the books and records of the corporation at the close of such income year."

G.S. 55-49 defines in section (a) thereof, surplus as " . . . the excess of a corporation's net assets, as defined in this Chapter, over its stated capital. Such surplus consists of earned surplus or capital surplus or both, and shall be so classified on the books."

Other sections of G.S. 55-49 pertinent here are as follows:

"(b) Except where provisions of this Chapter specifically require a different standard or impose additional limitations, the assets of a corporation may, for the purpose of determining the lawfulness of dividends or of distributions or withdrawals of corporate assets to or for the shareholders, be carried on the books in accordance with generally accepted principles of sound accounting practice applicable to the kind of business conducted by the corporation."

"(d) Earned surplus is the portion of the surplus of a corporation equal to the balance of its net profits, income, gains and losses, including gains and losses realized from the disposition or destruction of fixed assets (but not including unrealized appreciation in the value of any assets), from the date of incorporation, after deducting subsequent distributions to shareholders and transfers to stated capital and to capital surplus to the extent that such distributions and transfers are made out of earned surplus, and after adding all transfers made from capital surplus as permitted by subsection (i) of this section, all computed in accordance with generally accepted principles of sound accounting practice applicable to the kind of business conducted by the corporation.

(e) Capital surplus is the entire surplus of the corporation other than its earned surplus, and includes, without being limited to, paid-in surplus, surplus arising from reduction

of stated capital and surplus arising from a revaluation of assets made in good faith upon demonstrably adequate bases of revaluation. Capital surplus may be classified on a corporation's books and statements according to its derivation."

"(g) In computing earned surplus or net profits, deduction shall be made for such obsolescence, depletion, depreciation, losses, bad debts and other items as accords with generally accepted principles of sound accounting practice."

It is clear, we think, that the purpose of G.S. 105-122 is to *levy* a tax upon going corporations for the privilege of doing business in this State.

" 'In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen.' " *Pipeline Co. v. Clayton, Comr. of Revenue,* 275 N.C. 215, 226-227, 166 S.E. 2d 671 (1969), quoting *Gould v. Gould,* 245 U.S. 151, 153, 62 L.Ed. 211, 38 S.Ct. 53 (1917).

In the Business Corporation Act, and particularly G.S. 55-49, the General Assembly specifically decreed that the books and records of a corporation must be kept in accordance with "generally accepted principles of sound accounting practice." The statute levying a franchise tax requires that the tax be computed on a base the information for which is obtained from the books and records of the corporation. Since the books and records must be kept using "generally accepted principles of sound accounting practice," it seems, *a fortiori,* that the base upon which the franchise tax is computed must be arrived at in the same fashion.

We then determine what treatment generally accepted principles of sound accounting practice require with respect to deferred income tax on installment sales in arriving at "surplus and undivided profits" as the base for computing franchise tax. First, the franchise statute does not define surplus. The Corporation Act does, however, define surplus as "the excess of the corporation's net assets (as defined in Chapter 55) over its

stated capital." G.S. 55-49(a). Net assets are defined as " . . . the amount of a corporation's assets in excess of its liabilities." G.S. 55-2(8). Liabilities, by G.S. 55-2(7), include debts and claims determined in accordance with generally accepted principles of sound accounting practice.

Although the term "undivided profits" is not now generally used in the accounting world, except by banks, it was currently in use in 1927, when the phrase first appeared in the franchise tax statute. See 1927 PL, C 80 § 210. In *Edwards v. Douglas*, 269 U.S. 204, 215, 70 L.Ed. 235, 241, 46 S.Ct. 85 (1925), the phrase undivided profits was defined to mean those profits which had "neither been distributed as dividends nor carried to surplus account upon the closing of the books; that is, current undistributed earnings."

It would appear then that the phrase "surplus and undivided profits" used in the statute levying a franchise tax (G.S. 105-122) has the same meaning as "surplus" as defined in the Business Corporation Act (G.S. Chapter 55).

Expert accountancy testimony was presented on behalf of plaintiff and was uncontradicted. The expert testimony was to the effect that there is no circumstance under generally accepted accounting principles whereby the $142,650.87 would be included in surplus without first a reduction for the taxes. In other words, the total amount of $142,650.87 would never reach the surplus item on the balance sheet. The deferred tax expense should be shown in the liability section of the balance sheet and not included in the stockholder's equity section. If included in the stockholder's equity section, it is considered inaccurate and misleading. There can be no real doubt with respect to the correctness of the accounting principles as testified to by plaintiff's expert witness in terms of generally accepted principles of sound accounting as applied to the method of reaching a franchise tax base contended for by plaintiff. Securities and Exchange Commission Regulation 210.3-16, subparagraph 0 (1975); Securities and Exchange Commission Regulation 210.5-02 (adopted in Release No. AS-149 effective for financial statements filed after 28 December 1973); Securities and Exchange Commission, Accounting Series Release No. 85 (Feb. 1960) (17 CFR Part 211); Accounting Principles Board Opinion No. 11, sec. 59 (Dec. 1967).

A case very much in point is *American Can Co. v. Director of the Div. of Tax.*, 87 N.J. Super. 1, 207 A. 2d 699 (1965). There the appeal involved the sum of $4,215.57 additional franchise tax liability which resulted from the Director of the Division of Taxation's action in adding to the taxpayer's reported net worth a $20,300,001 "reserve for deferred income taxes" which was shown on the taxpayer's books as a liability. The Director took the position, as does the Secretary here, that the reserve for deferred taxes was a surplus reserve and includible in net worth for franchise taxes. The Director argued, as does the Secretary here, that the amount of the deferred taxes was conjectural, depending upon future tax rates and future net profits, and that in the meantime the taxpayer had unrestricted use of the funds represented by the item of deferred income tax. The New Jersey Court noted that the statute required that the taxpayer's books be maintained in accordance with sound accounting principles and that the Director make a determination of net worth, for purposes of franchise tax, in accordance with sound accounting principles.

In holding that the Director was in error the Court said at pages 704-705:

> "By contrast, there is no dissent in the present case that proper accounting practice, in setting up a reserve for deferred taxes because of general purpose accounting on a straight-line depreciation basis contemporaneous with computation of income taxes by use of accelerated depreciation, requires the fixing of the *amount* of the reserve at the tax dollar (income tax) saving produced by applying the current income tax rate against the gross difference in depreciation reflected by the respective different depreciation rate schedules. What the Director contends for here in his right to eliminate the *entire* deferred tax reserve from the liability side of the corporate balance sheet and to incorporate it into surplus, thereby enlarging net worth. That this is proscribed by generally accepted accounting principles, and was, as of December 31, 1958, is indubitable from the record of this case."
>
> "But the State fails to present a tangible rational reason why we should not here, as we recognized as necessary in Macy, impose the limitation plainly written into the statute that any redetermination of net worth by the Director must

of itself pass muster as comporting with sound accounting principles in the sense that the accounting profession would understand that term. In the name of interpretation 'for purposes of the act' we are here asked, in effect, to ignore a plain, unambiguous and express proviso of the statute. And this for no other reason than that the Director regards a deferred tax reserve, which sound accounting practice requires to be reflected in the balance sheet lest a corporation present a misleading picture of its financial posture, as merely contingent.

As to the contingency of the reserve, or the degree thereof, the Director may or may not be theoretically correct were we permitted to examine that concept *a priori* and free from the restrictions of the statute. But in terms of whether any such contingency permitted the Director's relegation of the reserve to surplus, so as to incorporate it into the taxable net worth base, it is entirely logical to deduce from the statutory language that the Legislature preferred to make the matter depend on the objective criterion of the consistency of such action with sound accounting principles rather than to inject it into the area of technical litigation over contingency. Presumably there might be little or no element of contingency in such a reserve in the case of some taxpayers. Exploration of all the relevant facts (which did not take place at the hearing in the present matter) might frequently require hearings of a length and complexity which it may well be inferred the Legislature intended to avoid when it devised what it considered to be a 'relatively simple and administratively feasible formula for measuring the value of the exercise of the corporate privilege in this State.' See Macy, *supra* (77 N.J. Super., at p. 167, 185 A. 2d at p. 689). Moreover, in the light of the statute, once it were determined that placing the instant reserve in surplus would offend the relevant settled sound accounting principle it would be quite inappropriate for the court to entertain any debate as to the merits (in an accounting sense) of the particular accounting principle implicated."

The New Jersey Court also noted that there are cases holding to the contrary but pointed out the differences in statutory language.

In the case before us, there was no expert accounting testimony on behalf of the Secretary contradictory of plaintiff's

testimony with respect to the correct accounting principles applicable here. The witness for the defendant merely testified that he had been employed by the Corporate Tax Division of the North Carolina Department of Revenue since 1958 and that, to his knowledge, "the deferred taxes that have been claimed by the plaintiff as taxes accrued have never been allowed by the Secretary of Revenue as a deduction or exclusion from the capital stock surplus and undivided profits franchise tax base." As we pointed out earlier, whether the item of deferred taxes qualifies as "accrued taxes" within the exception in the statute is not, we think, determinative of this appeal.

Among the facts found by the court were these:

"16. The statutory franchise tax base of a corporation, measured by 'the total amount of its issued and outstanding capital stock, surplus and undivided profits,' is found in G.S. 105-122(b). The terms used in the tax base are not defined in the statute.

17. The issued and outstanding stock of the plaintiff was reflected on its books and records at $3,000.00 and is undisputed as being an accurate reflection of the plaintiff's issued and outstanding capital stock.

18. The statutory term 'surplus and undivided profits' is not used together in current commercial accounting terminology. The phrase first appeared in the Franchise Tax Act in 1927 (1927 PL, Chapter 80, Sec 210). At that time, 'surplus' was used to mean the excess of the aggregate value of all the assets of a corporation over the sum of all of its liabilities including capital stock. Current accounting terminology does not treat capital stock within the category of liabilities but includes it in a corporation's 'net assets,' 'net worth' or 'stockholders' equity' section of the balance sheet; i.e., total assets less total liabilities. In 1927 the term 'undivided profits' was used in accounting terminology to mean profits which have neither been distributed as dividends nor carried to a surplus account upon the closing of the books. 'Undivided profits' is found to mean the current portion of the surplus account. 'Surplus and undivided profits,' when taken together, in the context of their normal commercial usage in 1927, has the same meaning as 'surplus' in current commercial accounting terminology; i.e., that portion of the stockholders' equity or net

worth in excess of the amount of issued and outstanding capital shares, all as determined in accordance with generally accepted principles of sound accounting practice.

19. Periodic additions to the surplus and undivided profits of a corporation arise from the periodic determination of the net financial accounting income of the corporation after the deduction of the income tax expenses for the period.

20. The matching of revenue and expenses in the determination of net financial accounting income is a generally accepted principle of sound accounting practice. (It is found from the evidence that such sound accounting practices require that when the surplus and undivided profits of a corporation are increased by the inclusion in the pretax financial accounting income of the anticipated future income to be realized upon the collection of installment sales contracts, a reduction in such pretax financial accounting income is required for the income tax expense to be incurred in the future accounting period in which the profit on the installment sales becomes part of taxable income.)

21. Generally accepted accounting practices require that the measurement of the tax effect of the inclusion in revenue of the profit on installment sales should be made by calculating the differential between income taxes computed with and without inclusion of the profit on installment sales which create the difference between taxable income and pretax financial accounting income. The resulting income tax expense for the period includes the tax effects of all transactions entering into the determination of net financial accounting income for the period. The resulting deferred tax amount reflects the tax effects which will reverse in future periods. The deferred tax is not properly reported as a part of stockholders' equity or net worth but in the liability section of the balance sheet. The measurement of income tax expense is, by such treatment, a consistent and integral part of the process of matching revenue and expenses in the determination of net financial accounting income.

22. The taxable income of the plaintiff for the fiscal year ended October 31, 1964, exceeded $25,000.00. It is found from the evidence that it was reasonable to assume that

the taxable income of the plaintiff, without regard to taxable income arising from the collection of installment receivables, would in years subsequent to 1964 exceed $25,000.00. The North Carolina income was a level 6% rate, and the U.S. income tax on taxable income in excess of $25,000.00 was 48%.

23. The deferred North Carolina and U.S. income taxes on the $142,650.87 of gross profit on installment sales, added to the plaintiff's surplus and undivided profits by the defendant, amounted to $72,923.12 when measured in accordance with generally accepted accounting practices.

24. The increase as of October 31, 1964, in surplus and undivided profits of the plaintiff; determined in accordance with generally accepted principles of sound accounting practice, was $69,727.75.

. . .

26. (It is found that the amount of the capital stock, surplus and undivided profits of a corporation reporting its installment sales on an accrual method for financial income accounting purposes will be the same regardless of whether it reports its taxable income on the accrual method or on the installment method.) The defendant at the trial admitted that a corporation reporting its taxable income on the accrual method would be allowed to measure its franchise tax base by the reduction of current financial accounting income by the entire income tax expense attributable to the revenue included in its financial income but that a corporation reporting its taxable income on the installment method would, under the interpretation of the defendant, be denied the reduction of such income by the portion of the income tax expense relating to the anticipated future profit on the installment sales.

27. The franchise tax base of the plaintiff determined upon the basis of its issued and outstanding capital stock, surplus and undivided profits amounted to $153,256.95 as of October 31, 1964."

Of these defendant excepted only to that portion of 20 and 26 in parentheses. Upon the findings of fact the court made the following pertinent conclusions:

"2. In construing and interpreting the language of the statute, the Court must be guided by the primary rule of

construction that the intent of the Legislature controls. Where the language of a statute is clear and unambiguous, judicial construction is not necessary. Its plain and definite meaning controls. But if the language is ambiguous and the meaning in doubt, judicial construction is required to ascertain the Legislative intent. PIPELINE CO. v. CLAYTON, COMR OF REV, 275 NC 215, 226 (1969).

3. In construing a statute, the Court's aim is to discover the connotation which the Legislature attached to the words or phrases and clauses employed, thus the words of a statute must be taken in the sense in which they were understood at the time when the statute was enacted, and the statute must be constructed as it was intended to be understood when it was passed. TELEPHONE CO v CLAYTON, COMR OF REV, 266 NC 687, 689 (1966).

4. Where the meaning of a tax statute is doubtful, it should be construed against the State and in favor of the taxpayer unless a contrary Legislative intent appears. PIPELINE CO v CLAYTON, COMR OF REV, *supra* at 226.

5. An administrative interpretation which requires all taxpayers electing the installment method of accounting to include the deferred gross profit from installment sales without regard for any possible or anticipated future Federal or State income tax liability may be considered by the Court, but it is not controlling. PIPELINE CO v CLAYTON, COMR OF REV, *supra* at 227.

6. Where there is a conflict between the interpretation of an administrative agency and that of the Court, the latter will prevail. CAMPBELL v CURRIE, COMR OF REV, 251 NC 329; PIPELINE CO. v. CLAYTON, COMR OF REV, *supra* at 227.

7. The annual additions to surplus and undivided profits represent the revenue and expense transactions included in the determination of pretax financial accounting income reduced by income tax expenses. Such tax expenses properly include the tax effects of revenue and expense transactions included in the determination of pretax financial accounting income. Taxes are to be recognized in the periods in which the differences between pretax accounting income and taxable income arise. To say that the gross income which is anticipated to be received in the future upon collec-

tion of installment contracts receivable should be added to surplus and undivided profits, with no deduction allowed for the income taxes to be paid at the time the gross profit is includable in taxable income, is to add to a corporation's surplus and undivided profits an amount which will never become a part of the corporation's surplus and undivided profits and is contrary to a proper interpretation of G.S. 105-122.

. . .

9. The plaintiff is entitled to judgment against the defendant in accordance with these findings and conclusions with interest as provided by law."

Suffice it to say that the facts found by the court are amply supported by the evidence and the conclusions of law are supported by the facts found.

Affirmed.

Judges PARKER and MARTIN concur.

STATE WHOLESALE SUPPLY, INC. v. THURMAN ALLEN, T/A KERR LAKE SUPPLY COMPANY

No. 757DC760

(Filed 4 August 1976)

1. **Attorney and Client § 7— sales receipt — invoice — provision for attorney's fees — invalidity**

Neither a sales receipt nor an invoice containing a provision for attorney's fees is an "evidence of indebtedness" within the meaning of G.S. 6-21.2 and, absent a written agreement relating thereto, such provision is ineffectual as a matter of law.

2. **Usury § 1— open account — applicability of usury statute**

A plumbing contractor's open account with a plumbing supply wholesaler constituted an "open-end credit or similar plan" governed by G.S. 24-11, and a two percent service charge on the account violates the one and one-half percent ceiling prescribed by the statute.

3. **Usury § 1— higher price for deferred payment — no usury**

The sale of merchandise is not usurious when the sale is made for one price if cash is paid and for a higher price if payment is deferred or made in future installments, so long as the transaction is not a subterfuge to conceal a usurious loan.

4. Interest § 1; Usury § 1— service charge on open account — usurious interest

A two percent per month service charge on the unpaid balance of an open account for plumbing supplies did not constitute a "time price" but was a charge for the seller's forbearance in the collection of the debt at the end of the payment period and, as such, constituted interest; such interest was usurious since it exceeded the one and one-half percent allowed by G.S. 24-11, and forfeiture of the entire two percent service charge is appropriate under G.S. 24-2.

APPEAL by defendant from *Matthews, Judge.* Judgment entered 6 June 1975 in District Court, NASH County. Heard in the Court of Appeals 20 January 1976.

The plaintiff, State Wholesale Supply, Inc. (hereinafter referred to as Wholesale), is engaged in the wholesale supply business and sells equipment exclusively to licensed plumbing, heating and air-conditioning contractors. The defendant, Kerr Lake Supply Company (hereinafter referred to as Kerr Supply), is in the plumbing business. In May 1974 the manager of Kerr Supply, on behalf of the company, completed an application for credit with Wholesale. Shortly thereafter an open account was established for Kerr Supply at Wholesale. Although the credit application is not part of the record on appeal or otherwise available for inspection, Wholesale's manager described the informal nature of the credit application on cross-examination: "The credit application which was filled out by Mr. Elmer Deal contained no statement of credit terms or collection charges, it is simply a form asking for credit references. We did not ask Mr. Allen or his wife to sign a personal guarantee of the account when the application was filed as his credit appeared to be good. . . . Prior to extending credit to Kerr Lake Supply Company, I did not, nor to my knowledge did any employee of State Wholesale Supply, Inc., discuss our credit policy with Mr. Allen." Beginning in August defendant purchased equipment and materials from Wholesale on open account. Between 23 August and 13 November at least twenty-five purchases were made by Kerr Supply on open account. No contract or other form of writing was signed by Kerr Supply's representative before or at the time of each purchase. Upon delivery of the merchandise to Kerr Supply's place of business, Wholesale issued Kerr Supply two copies of the sales ticket for that merchandise and required a Kerr Supply employee to sign and return one of the sales tickets to acknowledge receipt of the merchandise. An employee of Wholesale signed the receipt for every delivery

except one. Within three days of the delivery, Wholesale mailed Kerr Supply an invoice, and at the end of each month Wholesale mailed Kerr Supply a monthly statement of the outstanding amount due on the account. The sales tickets and three-day invoice contained the following provisions: "A 2% per month service charge ($5.00 minimum) will be charged on past due accounts. Customer agrees to all attorney's fees and collection expenses up to 15% of the total amount." The monthly statements contained the two percent service charge provision but omitted any reference to attorney's fees. Finally Wholesale offered evidence to the effect that the two percent service charge is a "customary charge" in the wholesale plumbing, heating and air-conditioning business. By stipulation the parties agreed that the defendant owed plaintiff the sum of $6,792.53 as of the compromised date of 1 November 1974.

After presentation of the evidence, the judge entered findings of fact and conclusions of law. Of particular importance to the issues raised by this appeal are the following "Further Findings of Fact and Conclusions of Law":

> "1. North Carolina General Statutes Section 24-11 is an enabling statute to allow interest or service charge up to 1½% per month for balance not paid within 25 days (which does not apply to instant case) and applies to charges imposed on CONSUMER or CREDITOR (of which defendant is neither). The defendant does not come under or within the means of this enabling statute. A 2% service charge in this instance and in this type of transaction is not usurious interest in that this charge is a customary service charge in this type of business: that the transaction is not a loan, either expressed or implied, but an extension of credit or service.
>
> "2. That the defendant was aware of and agreed to the 2% service charge and attorney's fee charged through his agent's knowledge (Elmer Deal as Manager of the defendant's business applied for credit and signed some sales tickets with both statements concerning the 2% service charge and attorney's fee printed thereon); that defendant took advantage of the 2% discount by the 10th of the following month which was stated on the 3-day invoices and on which the 2% service charge and attorney's fee allowance was stated; that the service charge was stated

and added on each monthly statement and the defendant did not object to the terms prior to this action.

"3. Under North Carolina General Statutes Section 6-21.2 the sales ticket and invoice is an evidence of indebtedness on which the attorney's fees for collection is stated and this was known and accepted by the defendant."

Based on these findings, it was ordered that the plaintiff recover from the defendant the sum of $6,792.53, plus service charges at the rate of two percent per month from 1 November 1974 until paid, and attorney's fees in the sum of fifteen percent of the principal amount owed.

Dill, Exum, Fountain & Hoyle, by John B. Exum, Jr., for the plaintiff.

Zollicoffer & Zollicoffer, by Robert K. Catherwood, for the defendant.

BROCK, Chief Judge.

The plaintiff relied upon the following evidence to show that the defendant incurred the obligation to pay a two percent service charge and attorney's fees: (1) The sales receipt signed by defendant's employee, the three-day invoice, and the monthly statement contained written notice of the two percent per month service charge, and all but the latter contained a provision for attorney's fees; moreover, having received notice of these "credit terms," the defendant continued to purchase goods from the plaintiff on open account; (2) the treasurer and principal stockholder of Wholesale testified that the two percent per month service charge is customary in the wholesale plumbing, heating and air-conditioning industry; and (3) an employee of defendant applied for "credit" before purchasing goods from plaintiff on open account.

Plaintiff's argument seems to be that mere notice of the service charge or attorney's fees after the open account had been approved and initial purchase of goods made constituted an offer which the buyer implicitly accepted by continuing to use the open account. In effect, plaintiff argues that notice of the terms created a duty to protest or cease using the account in order to avoid the service charge and attorney's fees obligations. We disagree. First, the service charge and attorney's fees provisions printed on the sales receipt, invoice, and monthly

statement were not explicitly portrayed as essential conditions for the use of the open account. At the time these terms were communicated to the defendant buyer, the plaintiff had already authorized the defendant to purchase on open account. Secondly, although the plaintiff required the defendant to complete a credit application prior to authorizing defendant to purchase on open account, the credit application made no reference to the service charge and attorney's fees obligations. The plaintiff's failure to prepare and execute a formal agreement with defendant, which unequivocally defined a proper service charge and attorney's fees obligations as credit terms and conditions for the privilege of purchasing on open account, is inexplicable. Indeed the plaintiff approved defendant's application to purchase on open account without entering such an agreement beforehand, and led the defendant to believe that the right to purchase on open account was not subject to a service charge and attorney's fees obligation.

Nevertheless, assuming arguendo that defendant received advance notice of plaintiff's intention to add a two percent service charge and attorney's fees to the amount of indebtedness, we are confronted with whether plaintiff may legally enforce such charges.

The jurisprudence of North Carolina traditionally has frowned upon contractual obligations for attorney's fees as part of the costs of an action. In 1892 the Supreme Court held that a provision in a promissory note which imposed an obligation for a "collection fee" (i.e., attorney's fees) was contrary to public policy and therefore invalid. *Tinsley v. Hoskins,* 111 N.C. 340, 16 S.E. 325 (1892). This longstanding prohibition against attorney's fees obligations is rooted in a variety of concerns: "They [provisions for attorney's fees] can readily be used to cover usurious agreements, and excessive exactions may be under the guise of an attorney's fee"; and "they are not only in the nature of penalties . . . [but also they] tend to encourage litigation." *Tinsley v. Hoskins, id.*

[1] General Statute 6-21.2, enacted in 1967, represents a far-reaching exception to the well-established rule against attorney's fees obligations:

> "Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges

> specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity. . . . "

The statute applies only to "obligations to pay attorneys' fees upon any note, conditional sales contract or *other evidence of indebtedness.*" (Emphasis added.) In our opinion the sales receipt and three-day invoice containing the provision for attorney's fees is not an "evidence of indebtedness" within the meaning of G.S. 6-21.2. Evidence of indebtedness signifies a written agreement or acknowledgment of debt, such as a promissory note or conditional sales contract, which is executed and signed by the party obligated under the terms of the instrument.

General Statute 6-21.2 only validates attorney's fees obligations in certain carefully defined instances and imposes a ceiling on the amount of attorney's fees a party can obtain. It is clear that a "note" and "conditional sales contract" are the primary types of "evidence of indebtedness" contemplated by the statute. General Statute 6-21.2(1) and (2) repeat the reference to "note, conditional sale contract or other evidence of indebtedness" found in the opening declaration of the statute. General Statute 6-21.2(3) and (4) focus specifically on "notes and other *writing(s)* evidencing an indebtedness" (emphasis added) and "an unsecured note or other writing(s) evidencing an unsecured debt" respectively. General Statute 6-21.2(4) refers specifically to "conditional sale contracts and other such security agreements which evidence both a monetary obligation and a security in or a lease of specific goods. . . . " These provisions indicate, either explicitly or implicitly, that an evidence of indebtedness (such as a note or conditional sales contract) is a *writing* which acknowledges a debt or obligation and which is executed by the party obligated thereby.

In this case a formal credit agreement executed by the parties *prior to* the establishment of the open account would have sufficed as an evidence of indebtedness; and had such an agreement contained a provision for attorney's fees, it would be valid and enforceable pursuant to G.S. 6-21.2. Instead, plaintiff inserted the provision for attorney's fees in the sales receipt and three-day invoice, mere business records of defendant's purchase and the amount of money due plaintiff for the purchase. Neither

the sales receipt nor invoice is an evidence of indebtedness within the meaning of G.S. 6-21.2. Therefore, the provision for attorney's fees in the sales receipt and invoice, absent a written agreement by defendant, is ineffectual as a matter of law. The trial court's finding and conclusion to the contrary are erroneous.

[2] The next question raised by this appeal is whether the open account and service charge for the unpaid monthly balance is governed by G.S. 24-11. General Statute 24-11(a) provides, in part:

> "On the extension of credit under an open-end credit or similar plan (including revolving credit card plans, and revolving charge accounts, but excluding any loan made directly by a lender under a check loan, check credit or other such plan) under which no service charge shall be imposed upon the consumer or creditor if the account is paid within twenty-five days from the billing date, there may be charged and collected interest, finance charges or other fees at a rate in the aggregate not to exceed one and one-half percent (1½%) per month on the unpaid balance of the previous month. . . ."

Unlike the Retail Installment Sales Act (Chapter 25A), the application of G.S. 24-11 is not limited to "consumer credit sales"; it extends to transactions between merchants as well as transactions involving a consumer. Moreover, G.S. 25A-11 defines a "revolving charge account contract" as follows:

> " 'Revolving charge account contract' means an agreement or understanding between a seller and a buyer under which consumer credit sales may be made from time to time, under the terms of which a finance charge or service charge is to be computed in relation to the buyer's unpaid balance from time to time, and under which the buyer has the privilege of paying the balance in full or in installments."

However, the statute explicitly provides that "[t]his definition shall not affect the meaning of the term 'revolving charge account' appearing in G.S. 24-11(a)." Indeed the scope of G.S. 24-11 appears to be considerably broader than G.S. 25A, but the specific difference in meaning between the "revolving charge account" described in G.S. 24-11(a) and the "revolving charge

account" defined by G.S. 25A-11, if any other than the fact that G.S. 25A-11 is limited to *consumer* credit sales, is unclear. In our opinion the open account and service charge in this case constitutes an "open-end credit or similar plan" governed by the provisions of G.S. 24-11. The two percent service charge clearly violates the one and one-half percent ceiling prescribed by the statute.

Defendant contends that the portion of the service charge in excess of the one and one-half percent monthly charge allowed by G.S. 24-11 is usurious; furthermore, it is argued that the appropriate remedy is forfeiture of the entire interest pursuant to G.S. 24-2. On the other hand, plaintiff contends that the two percent monthly service charge is not usurious because it is not interest charged for a loan or forbearance of money.

[3] Usury is the charging of interest in excess of the legal rate for the hire or use of money. The essential elements of an action for usury are well settled and need not be repeated herein. *See Hodge v. First Atlantic Corp.*, 10 N.C. App. 632, 179 S.E. 2d 855 (1971). Usury only pertains to a loan or forbearance of money, not a *bona fide* sale. In recent years the definition of bona fide sale has been expanded to include credit sales in which the difference between the cash price and the credit or time price is greater than the allowable rate of interest.

> "A vendor may fix on his property one price for cash and another for credit, and the mere fact that the credit price exceeds the cash price by a greater percentage than is permitted by the usury laws is a matter of concern to the parties and not to the courts, barring evidence of bad faith. (Citations omitted.)
>
> . . . .
>
> "If there is a real and bona fide purchase, not made as the occasion or pretext for a loan, the transaction will not be usurious even though the sale be for an exorbitant price, and a note is taken, at legal rates, for the unpaid purchase money. The reason is that the statute against usury is striking at, and forbidding, the extraction or reception of more than a specified legal rate for the hire of money, and not for anything else; and a purchaser is not, like the needy borrower, a victim of a rapacious lender, since he can refrain from the purchase if he does not choose

to pay the price asked by the seller." *Bank v. Merrimon*, 260 N.C. 335, 132 S.E. 2d 692 (1963).

Thus it appears that the sale of merchandise is not usurious when the sale is made for one price if cash is paid and for a higher price if payment is deferred or made in future installments, so long as the transaction is not a subterfuge to conceal a usurious loan.

In *Bank v. Merrimon, id.*, the defendant purchased a second-hand car from a dealer; she paid $500.00 in cash, executed a promissory note for the remainder of purchase price payable in monthly installments, and executed a chattel mortgage to the dealer and a third party trustee as security for the note. In addition she signed a "confirmation of sale" which listed the "cash selling price" of the car and the "differential for time payment." A subsequent case affirming the time price doctrine, *Bank v. Hanner*, 268 N.C. 668, 151 S.E. 2d 579 (1966), also involved a conditional sales contract, finance charges greater than the rate of interest permitted by the usury statute, and a chattel mortgage to secure the outstanding balance.

Defendant relies upon *State v. J. C. Penney Co.*, 48 Wis. 2d 125, 179 N.W. 2d 641 (1970); *see* 41 A.L.R. 3d 660. There, a department store's charge of one and one-half percent monthly interest on the declining balance of its revolving charge account was declared usurious on the theory that the deferment of payment for goods purchased transformed the relationship between the vendor and buyer into that of creditor-debtor; a forbearance occurred when the buyer failed to pay within the prescribed period (30 days) and, simultaneously, the vendor refrained from collecting the existing debt in exchange for the service charge. The time price doctrine was deemed inapplicable to this transaction due to the absence of a fixed time price at the time of the sale. According to this opinion, the time price doctrine requires that the cash price *and* time price be fixed and quoted to the buyer at the time of the sale in order to afford the buyer a genuine choice.

[4] In our view the two percent per month service charge sought to be imposed by plaintiff does not constitute a "time price" but is a charge for plaintiff's forbearance in the collection of the debt at the end of the payment period; as such, the two percent per month service charge is interest. The two percent service charge exceeds the maximum one and one-

half percent allowed by statute and is usurious. The trial judge was in error in finding and concluding to the contrary. A forfeiture of the entire two percent service charge is appropriate under G.S. 24-2.

For the reasons set out above, the plaintiff is not entitled to recover attorney's fees and is not entitled to recover interest except at the legal rate of six percent per annum on the principal of the judgment from the date of its entry on 6 June 1975.

The judgment appealed from is modified to provide for judgment in favor of plaintiff in the sum of $6,792.53, plus court costs (not including attorney's fees) and interest at six percent per annum on the principal amount of the judgment from 6 June 1975.

Modified and affirmed.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. JEANETTE MARTHA GRIER

No. 7619SC6

(Filed 4 August 1976)

1. Assault and Battery § 14; Conspiracy § 6; Property § 4— conspiracy — malicious injury by explosives — sufficiency of evidence

The State's evidence was sufficient for submission to the jury on issues of defendant's guilt of (1) conspiracy maliciously to injure a named person, an S.B.I. agent, by use of an explosive device, (2) malicious injury of the S.B.I. agent by use of an explosive device, and (3) malicious damage to personal property, to-wit an S.B.I. automobile, being at the time occupied by the S.B.I. agent, by use of an explosive device, where it tended to show: defendant and three companions met in defendant's home; when a State's witness arrived, one of the companions asked the witness if he knew the S.B.I. agent and slammed the witness against the wall when he denied knowing the agent; defendant asked the witness about the license plate number of the car he was in earlier, apparently referring to the car used by the S.B.I. agent; while the witness was held at gunpoint, defendant stated that the witness "didn't have to tell them anything, they already knew who [the S.B.I. agent] was"; dynamite, wire and blasting caps were brought into defendant's home and were there openly displayed and discussed by two of defendant's companions; on several occasions

during this period, defendant went with two of her companions to another room of the house; one of the companions left defendant's house with the dynamite; defendant then left her residence and left her automobile behind to be used by her companions; two of the companions and the witness, who was still held at gunpoint, drove in defendant's car to another city where they met the third companion with the dynamite; those four drove in defendant's car to the S.B.I. agent's car, where two of the companions wired the dynamite to the agent's car; and the dynamite exploded when the agent attempted to start the car the following day.

2. **Conspiracy § 3— implied understanding — sufficiency for conviction**

For one to be convicted of the crime of conspiracy, the State need not prove that the parties agreed in express terms to unite for the common illegal purpose since a mutual, implied understanding is sufficient to constitute the offense.

3. **Conspiracy § 3— participation in planned crime not required**

Active participation in the planned criminal activity is not required to establish guilt of conspiracy.

4. **Conspiracy § 5— guilt of crimes contemplated by conspiracy — defendant not present at crime scene**

Defendant, as a party to a conspiracy, is equally guilty as a principal with the other participants in the commission of the crimes contemplated by the conspiracy even though defendant was not personally present when those crimes were committed.

ON *writ of certiorari* to review trial before *Rousseau, Judge.* Judgments entered 14 March 1975 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 14 April 1976.

On the morning of 10 September 1974 Albert Stout, Jr., a Special Agent employed by the State Bureau of Investigation, left his apartment in Salisbury and got into the automobile provided for his use by the S.B.I. When he turned the key in the ignition an explosion occurred which demolished the car and severed his right leg. He was otherwise severely injured, but survived. Investigation by S.B.I. agents revealed that the explosion was caused by dynamite placed on the transmission of the automobile and wired to the starter.

In December 1974 the grand jury in Rowan County returned as true bills three indictments charging defendant as follows: (1) that she feloniously conspired with Jack Sellers, Jule Hutton, Otis James Blackmon, and Wilbut James Sanders willfully and maliciously to injure Albert Stout, Jr., by the use of an explosive device, a violation of G.S. 14-50(a); (2)

that she willfully and maliciously injured Stout by the use of an explosive device, a violation of G.S. 14-49(a); and (3) that she willfully and maliciously damaged personal property, to wit the S.B.I. automobile, being at the time occupied by Stout, by the use of an explosive device, a violation of G.S. 14-49.1. On motion of defendant, the cases were transferred for trial from Rowan to Randolph County. They were consolidated for trial, and defendant pled not guilty to all charges.

The State presented evidence to show the cause and effects of the explosion. Officer Stout testified that he was an undercover agent for the S.B.I. and in that capacity had purchased heroin from defendant, Jeanette Grier, and had testified against her in court at Charlotte. He had also purchased heroin from and testified against Otis James Blackmon. On 9 September 1974 he went to Charlotte to make an undercover narcotic purchase, driving the S.B.I. car, a brown Ford Torino. He went to the apartment of Jule Hutton, but did not see Hutton there. He returned to his apartment in Salisbury about midnight and locked and left the car on the apartment parking lot. When he attempted to start it on the following morning, the explosion occurred.

Jule Hutton, presented as a witness for the State, testified in substance to the following:

In September 1974 and for several months prior thereto he lived in Charlotte, working as a construction worker and also working with the Charlotte Police Department as an informer in connection with the drug traffic. In late August he met Officer Stout, whose last name he did not then know and who was introduced to him simply as "Al." He also knew the defendant, Jeanette Grier, and had been to her house to purchase drugs. On one occasion in late August he went there in the brown Ford Torino belonging to the S.B.I., but on that occasion the car was driven by another S.B.I. agent, not by Stout. On the afternoon of 9 September he again went to defendant's house. On arrival, he found Jack Sellers, Wilbut James Sanders, and Otis Blackmon, all of whom he had previously met, already there. Sellers was sitting on the couch in the living room, playing with a .38 caliber pistol. Otis Blackmon was standing in the doorway. Blackmon asked Hutton if he knew Albert Stout, and Hutton replied that he did not. Thereupon, Blackmon walked over, grabbed Hutton, and slammed him against the

wall. By this time the defendant, Jeanette Grier, came into the living room. She asked Hutton if he "thought any more about the license plate number of the car [he] was in earlier?" (Hutton was earlier in the brown Torino.) Hutton replied that he hadn't. Blackmon then pushed Hutton down on the couch. Sellers handed the gun to Sanders, telling Sanders to watch Hutton. Defendant Grier stated that Hutton "didn't have to tell them anything, they already knew who Albert Stout was." Grier, Blackmon, and Sellers then left the living room and went into another part of the house. When they returned several minutes later, Blackmon stated he "didn't know what was keeping that damn guy." Blackmon then left the house by the front door. A few minutes later he returned through the back door, followed by a man Hutton did not know. This man carried a brown paper bag with a Winn Dixie sign stamped on it. He went into a bedroom. A few minutes later, Blackmon, Sanders, and defendant Grier came out, and Blackmon let the man out of the back door. The brown paper bag was on the dining room table. Hutton watched as Sellers put on gloves and unwrapped the bag. Sellers took out from the brown bag a smaller cellophane bag, which he cut open with a penknife. From the cellophane bag Sellers took five sticks of dynamite, wired with clips on the end and silver objects which looked like blasting caps. Hutton testified that at this point:

> "Mr. Blackmon hollered from the kitchen and asked Mr. Sellers was it all there. Mr. Sellers said, 'I don't know. I will let you know in a minute.' He proceeded to move the dynamite around, and he then stated to Mr. Blackmon it was all there. Mr. Blackmon said, 'Okay, cool.' "

Sellers then replaced the dynamite and other objects back into the cellophane bag and put this back inside the brown paper bag. After this was done, Blackmon, defendant Grier, and Sellers went into the bedroom. In about ten minutes, Blackmon and Sellers came out. Blackmon, telling Sellers he would get in touch with him later, picked up the brown paper bag and left by the front door. A few minutes later defendant Grier came out and, without saying anything to anyone, also left by the front door. Sellers then came over to Hutton and announced they were going to take a ride.

Sellers, first obtaining the revolver from Sanders, then left the house with Hutton by the rear door and got into a Buick

automobile which belonged to defendant Grier. They drove in this to Hutton's apartment, where they waited inside. After about twenty-five minutes, they heard a knock on the door. On peeping out, they saw Officer Stout standing on the front porch. At this time Sellers was holding the cocked pistol and was motioning to Hutton to be quiet. After knocking and getting no response, Stout left the porch and got into a car which resembled the brown Ford Torino. After Stout left, Sellers and Hutton waited five or six minutes and then drove back in defendant Grier's Buick to defendant's residence. There Sellers told Sanders that he had seen the undercover agent.

Later that night, Sellers, Sanders, and Hutton drove in defendant Grier's Buick to Salisbury. There they met Blackmon who was carrying the brown paper bag with the Winn Dixie sign on it. Blackmon got into the Buick with them, and Sellers drove to the apartment parking lot, where he pulled in behind the brown Torino. Sellers asked Hutton if that was "the undercover agent's Torino." Hutton replied that it was. Sellers and Blackmon then got out of the Buick, and went to Agent Stout's car, Blackmon carrying the brown paper bag with him. Sanders and Hutton remained in the Buick, Sanders holding the gun. Hutton watched as Sellers and Blackmon raised the hood on Stout's car, remain there several minutes, then lower the hood and return to the Buick. Blackmon stated "it would happen in the morning." They then drove from the parking lot to where Blackmon's car was parked. Before leaving the Buick, Blackmon told Sellers to kill Hutton and "leave him out beside the highway." Instead, Sellers drove Hutton in defendant's Buick back to defendant's home in Charlotte. There, after threatening Hutton, Sellers allowed Hutton to leave. The next day Hutton learned of the bombing and on the following day made a statement to the police.

Defendant Grier presented evidence, but did not herself testify. The jury found her guilty as charged in each of the three cases. The cases in which she was charged with conspiracy, a violation of G.S. 14-50(a), and in which she was charged with maliciously injuring Stout by the use of an explosive, a violation of G.S. 14-49(a), were consolidated for purposes of judgment. On the verdicts of guilty in these two cases defendant was sentenced to prison for a term of fifteen years. In the case in which defendant was charged with violation of G.S.

14-49.1 she was sentenced to prison for not less than fifty nor more than seventy years.

In apt time defendant gave notice of appeal. To permit perfection of the appeal, we granted defendant's petition for writ of certiorari.

Attorney General Edmisten by Associate Attorney T. Lawrence Pollard for the State.

Charles V. Bell for defendant appellant.

PARKER, Judge.

[1] Defendant brings forward but one assignment of error, that the court erred in denying her motions for nonsuit. We find no error.

When viewed in the light most favorable to the State, the evidence would permit the jury to find the following: On 9 September 1974, Blackmon, Sellers, and Sanders met with defendant Grier in defendant's home in Charlotte. Sellers was armed and openly displayed his pistol. When Hutton arrived, Blackmon asked Hutton if he knew Agent Stout. Hutton denied knowing Stout. In defendant's presence, Blackmon grabbed Hutton and slammed him against the wall. Defendant asked Hutton about the license plate number of the car he was in earlier, apparently referring to the brown Ford Torino used by Stout. Still in defendant's presence, Blackmon pushed Hutton down on the couch, while Sellers passed his gun to Sanders and told Sanders to watch Hutton. Defendant then stated that Hutton "didn't have to tell them anything, they already knew who Albert Stout was." Later, dynamite, wire, and blasting caps were brought into defendant's home and were there openly displayed and discussed by Sellers and Blackmon. On several occasions during this period, defendant went with Sellers and Blackmon to another room in the house. During all of these events, Hutton was being guarded by the threatening display of a pistol held either by Sellers or by Sanders. Blackmon left defendant's residence, carrying the dynamite with him. Shortly thereafter defendant also left her residence, leaving her Buick automobile behind to be used by Sellers.

On these findings it is a legitimate inference which the jury might draw that the plan to dynamite Stout's car was conceived and a number of important steps toward carrying out

the plan, including the assembling of the dynamite and accessory materials, were carried out in defendant's residence while she was present. Defendant must have been fully aware of what was taking place in her residence, yet she expressed no objection when dynamite was brought into her house, nor did she object at anytime during the extended period while Hutton was being held under armed guard in her house. Indeed, she even participated in questioning Hutton when she asked him concerning the license plate on Stout's car. That question, and her later statement that they already knew Stout's identity, demonstrates that she was fully aware of the subject under consideration. While these events were occurring in her home, on several occasions she went with Sellers and Blackmon to other rooms in her house, outside of Hutton's sight and hearing. A reasonable inference may be drawn that on these occasions the three discussed what was then taking place in the house. Finally, it is a reasonable inference which the jury might draw that defendant intentionally left her automobile to be used by Sellers in carrying out missions vital to the successful completion of the criminal enterprise in which he, Blackmon, and Sanders were then engaged. A reasonable inference clearly arises from all of the evidence that defendant not only knew and acquiesced in what was being planned in her home, but that she actively participated in the planning and joined in the criminal enterprise there undertaken.

[2, 3] A conspiracy is an "agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way." *State v. Parker*, 234 N.C. 236, 241, 66 S.E. 2d 907, 912 (1951). The offense is complete whenever the union of wills for the unlawful purpose is established; the conspiracy itself being the crime and not the execution of the deed. *State v. Anderson*, 208 N.C. 771, 182 S.E. 643 (1935). For one to be convicted of the crime of conspiracy, the State need not prove that the parties agreed in express terms to unite for the common illegal purpose. A mutual, implied understanding is sufficient to constitute the offense. *State v. Smith*, 237 N.C. 1, 74 S.E. 2d 291 (1953). "Since the gravamen of the offense of conspiracy is the agreement or union of wills for the unlawful purpose, active participation in the planned criminal activity is not required to establish guilt. 'A man may join a conspiracy by word or by deed. However, criminal responsibility for a conspiracy requires more than a merely passive attitude toward

an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with the other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime.' " *State v. Carey,* 285 N.C. 497, 502, 206 S.E. 2d 213, 218 (1974). "Direct proof of the charge is not essential, for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Whiteside,* 204 N.C. 710, 712, 169 S.E. 711, 712 (1933). Applying these principles, we find the evidence in this case clearly sufficient to withstand the motions for nonsuit on the charge of conspiracy.

[4] We also find the evidence sufficient to survive the motions for nonsuit in the other two cases, in which defendant was charged as a principal with violations of G.S. 14-49(a) and G.S. 14-49.1. Defendant, as a party to the conspiracy, was equally guilty as a principal with the other participants in the commission of the crimes contemplated by the conspiracy. It makes no difference that defendant was not personally present when those crimes were committed, for "once a conspiracy is shown, each conspirator 'is responsible for all acts committed by the others in the execution of the common purpose which are a natural or probable consequence of the unlawful combination or undertaking, even though such acts are not intended or contemplated as a part of the original design.' " *State v. Bindyke,* 288 N.C. 608, 618, 220 S.E. 2d 521, 528 (1975), quoting from *State v. Smith,* 221 N.C. 400, 405, 20 S.E. 2d 360, 364 (1942). This principle, which has been stated with approval many times in decisions of our Supreme Court, was recently applied to sustain a conviction of first degree murder in a case in which the killing was committed in defendant's absence by defendant's co-conspirator while attempting to perpetrate an armed robbery, which was the object of the conspiracy. In that case the defendant was not present at the scene of the killing, and the case was submitted to the jury under instructions that they should find defendant guilty of first degree murder if they found that defendant had entered into the conspiracy and that his co-conspirator, while attempting to carry out the object of the conspiracy, shot and killed the victim. Our Supreme Court

sustained the death sentence imposed. *State v. Carey*, 288 N.C. 254, 218 S.E. 2d 387 (1975).

We are, of course, advertent to the decision of this Court in *State v. Wiggins*, 16 N.C. App. 527, 192 S.E. 2d 680 (1972), and to other cases following that decision, in which it was held that one conspirator, if not present at the scene so as to make him an aider and abettor, cannot be held liable as a principal to the substantive crime committed in furtherance of the conspiracy by his co-conspirator, but could only be held as an accessory before the fact. *See also* Note, "Criminal Conspiracy in North Carolina," 39 N. C. Law Review 422, at p. 451, et seq. However, we cannot reconcile the holding in *State v. Wiggins, supra,* with the decisions of our Supreme Court above cited, and those decisions must control our decision here.

No error.

Judges MORRIS and MARTIN concur.

INTERMODAL TRANSPORTATION SYSTEMS, INC. v. HUCKS PIGGYBACK SERVICE, INC.

No. 7626DC267

(Filed 4 August 1976)

Contracts § 19; Landlord and Tenant § 5— option to purchase — invalid claim of right to possession — reasonableness of belief — consideration for novation

There was a genuine issue of material fact as to whether a letter from plaintiff's agent giving defendant the right to purchase leased equipment for $1,000 at the end of the lease period was intended by the parties to be a part of the lease and, if not, whether such option was supported by consideration; furthermore, there was a genuine issue of fact as to whether plaintiff had an honest and reasonable belief that no such option existed and that it had a valid claim for possession of the equipment when defendant attempted to exercise the option so that plaintiff's relinquishment of its claim for possession constituted sufficient consideration for a novation extending the lease at a reduced rental and extinguishing the option by implication.

APPEAL by defendant from *Hicks, Judge.* Judgment entered 5 January 1976 and order entered 5 February 1976, Dis-

trict Court, MECKLENBURG County. Heard in the Court of Appeals 17 June 1976.

Plaintiff alleges that on or about 1 March 1969, plaintiff and defendant entered into a lease agreement for the lease by defendant of an Ottawa Commando Yard Hustler for 36 months at a rental of $400 per month beginning 1 March 1969; that in April 1972, plaintiff and defendant agreed to extend the lease for a two-year period at a monthly rental of $250 with defendant having the right to purchase the equipment for $500 on 1 March 1974; that this agreement was made in a telephone conversation and confirmed by letter of agreement; that defendant paid the $250 monthly rental for nine months but has refused to pay anything further. Plaintiff sought to recover $4,000 from defendant.

By answer, defendant admitted all the allegations of the complaint, but, by way of further answer and defense and by way of counterclaim, averred that at the time the lease of 1 March 1969 was entered into, plaintiff, "through its agent, Robinson Equipment Company, in writing and as an inducement to the defendant to sign the above referred to lease agreement to which said writing was attached, promised the defendant that at the end of the lease, the tractor may be purchased for One thousand dollars ($1,000.00)." Defendant further averred that "at the time of the so-called renewal the defendant brought the above representation that the tractor may be purchased for One thousand dollars ($1,000.00) to the attention of the plaintiff, who denied it and said that no such agreement existed. The defendant could not find its copy and Thomas Hucks, Jr. signed the said letter of agreement individually and not on behalf of the corporation, Hucks Piggyback Service, Inc., the party to the original lease." Subsequent to the signing of the letter of agreement, the letter of Robinson was found and a copy is attached to the complaint. Defendant prayed that it recover of plaintiff the sum of $1500 and that plaintiff "sign over and deliver to the defendant the title to the said tractor in conformity with its written representation which accompanied the lease agreement in the first place, . . . "

By reply, plaintiff denied the averments with respect to the Robinson letter.

After interrogatories filed by plaintiff were answered by defendant, plaintiff moved to amend its complaint and make

L. E. Robinson an additional party defendant, which motion was allowed. Robinson subsequently moved for summary judgment. His motion was allowed, and no exception was taken to the entry of order allowing his motion.

On 7 March 1975, defendant moved for summary judgment which specifically stated that it "relates only to plaintiff's action and not to defendant's counterclaim." On 26 March 1975, plaintiff filed motion for summary judgment dismissing defendant's counterclaim and granting it the relief sought in its complaint. Grounds for the motion were "that there is no material issue of fact to be tried in the cause; that a statement of the facts which are not in dispute is attached to this Motion captioned 'Stipulation of Facts', although the plaintiff does not contend that such stipulations (sic) has been agreed to by either of the defendants in this case; that the uncontroverted facts in this case establish that the plaintiff and the defendant, Hucks Piggyback Service, Inc. entered into a novation whereby the defendant became indebted to the plaintiff as claimed by the plaintiff in its cause of action and the agreement to convey as alleged by the defendant, Hucks Piggyback Service, Inc., in its couterclaim became null and void and of no effect."

The stipulation of facts attached to the motion consisted of the following:

"(1) That Intermodal and Hucks entered into an equipment lease in March of 1969. A copy of the lease agreement is attached to the complaint filed herein as 'Exhibit A'.

(2) That at the time the lease was forwarded to Hucks for execution, L. E. Robinson advised Hucks by letter that Hucks could purchase the equipment for $1,000.00 at the end of the lease. A copy of the letter is attached to the answer filed herein as 'Exhibit A'.

(3) That the statement that the equipment could be purchased for $1,000.00 was authorized by Palmer Bayer, who was then President of Intermodal and had the authority to enter into contracts in its behalf.

(4) That Hucks made payments to Intermodal pursuant to the terms of the lease agreement for the entire thirty-six month term.

(5) That Hucks attempted to exercise the option to purchase the equipment for $1,000.00 in April of 1972, but did not have a copy of the letter from Robinson.

(6) That Intermodal could not locate any record of a $1,000.00 purchase option and refused to sell the equipment for that price.

(7) That on April 21, 1972, D. J. Schwall, Vice President and General Manager of Intermodal, agreed with Thomas Hucks, Jr., President of Hucks, that Intermodel would lease the equipment to Hucks for two years commencing as of March 1, 1972, for $250.00 per month and that Hucks could purchase the equipment on March 1, 1974, for $500.00.

(8) That on April 26, 1972, D. J. Schwall wrote to Thomas Hucks, Jr., setting forth the agreement referred to above and Thomas Hucks, Jr., accepted same on May 1, 1972. A copy of the letter with the acceptance is attached to the complaint filed herein as 'Exhibit B'.

(9) That Hucks paid Intermodal the $250.00 monthly payments through December of 1972, but stopped making payments after locating a copy of the letter from Robinson.

(10) That Hucks would want to purchase the equipment for $500.00 if it should be determined that the April 26, 1972, agreement is binding on it."

The affidavit of Thomas R. Hucks incorporated the Robinson letter as follows:

"Dear Mr. Hucks,

We are enclosing three copies of the lease on your tractor. Kindly sign all three copies and return to us for forwarding to Intermodal.

At the end of the lease, the tractor may be purchased for $1,000.00.

Yours truly,
ROBINSON EQUIPMENT CORPORATION
L. E. Robinson (signed)"

Hucks also stated by affidavit that the letter was attached to the lease; that he read this letter prior to signing the lease although Intermodal had already executed it; that he signed

the lease believing that the statement in the letter was made in good faith by Mr. Robinson and that Intermodal had authorized him to make the statement; that all his dealings with respect to the leased equipment were with Robinson and not with Intermodal prior to signing the lease.

The affidavit of L. E. Robinson was to the effect that he wrote the letter and was expressly authorized by the President of Intermodal Transportation Systems, Inc., Palmer Bayer, to make such a representation and that "such representation and inducement was made prior to the signature on the contract of the officers of Hucks Piggyback Service, Inc., and the statement that at the end of the lease, the tractor may be purchased for $1,000.00 was offered as inducement for Hucks Piggyback Service, Inc., to enter into the said agreement."

The deposition of Palmer Bayer was taken and excerpts from his testimony are quoted:

> " . . . There was an agreement between the Intermodal Transportation Systems, Inc. and Hucks Piggyback Service, Inc. with respect to this equipment after the term of the lease. I agreed that at the expiration of the lease in 1972, Hucks could acquire the equipment for $1,000. I agreed as president and chief executive officer of Intermodal under the authority that I had as president and chief executive officer that Intermodal would convey to him title of the equipment upon payment of $1,000 after the lease was concluded. In connection with that agreement, I communicated with L. E. Robinson of Robinson Equipment Corporation the terms of the lease that would be satisfactory to us so that he might in turn, as Robinson Equipment Corporation, communicate them to Hucks, both the terms with respect to the rental and the duration and other provisions and the agreement to make the equipment available to Hucks at the end of the lease for $1,000. I requested L. E. Robinson of Robinson Equipment Corporation to communicate the terms as I stated."
>
> " . . . This was not a normal transaction; in fact it was a unique transaction which was not repeated before or after so long as I was president of Intermodal. Enlarging on that, Hucks was the contractor in Charlotte, North Carolina, for the Southern Railway in performing services at their piggyback yard where trailers and containers were placed

on and taken off flat cars. I was approached on the basis that it would be a service or a favor to the Southern Railroad if we were to provide this equipment to Hucks. I talked to the man who was in charge of this at Southern Railway, a man named Denver Eyler, and he confirmed that it would be a service to them and that Hucks was indeed their contractor and that he desired them to have this equipment."

" . . . In my judgment, this was a very profitable transaction to Intermodal. The basis on which I say that it was very profitable is that at the time the transaction was made, Intermodal had its own funds with which to finance it. The rate was calculated—I calculated the rate—on the basis of a substantial return on the funds that we were investing in the equipment. Without getting into a lot of detail about it, it was as if we had loaned money out at 17 percent, which was profitable.

This was the lease rather than a conditional sales contract. I told Mr. L. E. Robinson of Robinson Equipment Corporation, as to the purchase of this Ottawa Yard Hustler at the termination of the lease, that the rate had been set as to allow the equipment to be sold at the end of 36-months payment of $400 a month or $1,000 and that he was privileged to communicate that to Mr. Hucks.

I spoke to Mr. Hucks myself, by the way. I gave him the terms under which we were willing to buy this equipment. As to what I said about the purchase of this equipment, I said the same thing I have said before, that he could buy the equipment from us for $1,000 at the expiration of the lease. This was in my official capacity as president and chief executive officer of Intermodal. I spoke to him by telephone from my office in Hoboken. I did authorize Mr. Robinson to also make this representation to Mr. Hucks."

" . . . Robinson Equipment Corporation was acting on Intermodal's behalf in the transaction. . . . "

" . . . As far as the rental calculation is concerned, the purchase option was in fact a part of the overall lease agreement. It was a factor considered in determining the rent. I requested our attorneys to prepare this lease; I did not advise them of the purchase option. This was because it was

not to be included in the lease. But it was to be included in the rental calculations which were part of the lease. As to why I did not want it to be included in the lease agreement, it would not then, according to my understanding from my accounting people and my attorneys, be a lease agreement. . . . "

"I did prepare a written memorandum for the file about this purchase option. When I left Intermodal, it was in Intermodal's files. There was a separate file set up on this particular lease. The memorandum was in that particular file. When I left, I didn't take any files with me. I didn't keep personal copies of things like that. I have no paper writing of any kind that makes reference to this purchase option."

" . . . this was a unique transaction before and after and was done almost as a courtesy to the Southern Railway. Our employees did not solicit this business. I handled it through Robinson Equipment Corporation from start to finsh."

The court, on 5 January 1976, "having considered the undisputed facts in the cause" concluded that the "Agreement entered into by the Plaintiff and Defendant in April 1972, constituted a novation which by implication extinguished any prior option to purchase the equipment which the Defendant might have had"; that "there are no material issues of fact to be tried in the cause" and entered judgment for plaintiff for $4,000 plus interest and provided that upon payment of the judgment by defendant, plaintiff would convey title to the leased equipment to defendant. Defendant appealed.

Fairley, Hamrick, Monteith & Cobb, by Laurence A. Cobb, for plaintiff appellee.

Jones, Hewson & Woolard, by Harry C. Hewson, for defendant appellant.

MORRIS, Judge.

Both parties now concede that there was a letter to defendant offering the privilege of purchasing the leased equipment for $1,000 at the end of the term of the lease. Although in its reply, plaintiff denied that Robinson was acting for it, in the

stipulation of facts submitted by plaintiff and signed by its counsel, it was admitted that the statement was authorized by Palmer Bayer, the then president of plaintiff who had the authority to enter into contracts on behalf of plaintiff. Plaintiff contends, however, that the letter was, in legal effect, a mere promise unenforceable because not supported by consideration; was not a part of the lease; and even if the letter was supported by consideration, the new agreement constituted a novation because it was supported by consideration. Plaintiff contends that defendant received benefits in that it obtained the right to continue in possession of the equipment and at reduced rental and was relieved of any obligation to pay the $1,000. On the other hand, the extension of the lease constituted a detriment to plaintiff in that it gave up its right to obtain possession of the equipment at the end of the original lease.

To us, the questions involved here cannot be so simply disposed of as plaintiff would have us believe. Hucks says that he signed the lease agreement because of the promise that he could purchase the equipment at the end of the term, having read and relied upon the letter before signing the lease. Bayer says the terms of the letter were not included in the lease because that would have changed the lease into a purchase agreement. But he testified that the purchase option was "in fact a part of the overall lease agreement," was a factor in determining the rent, and although not to be included in the lease, was to be included in the rental calculations which were part of the lease. Plaintiff takes the position that the Robinson letter was not intended to be a part of the lease. Bayer also testified that the transaction was quite a profitable one for plaintiff, that it was a unique transaction for the plaintiff and that it was entered into primarily because Southern Railway wanted Hucks to have the equipment, Hucks being the contractor in Charlotte for Southern in performing services at their piggyback yard where trailers and containers were placed on and taken off flat cars. Intermodal normally did not lease the powered equipment covered by the lease with defendant, but normally handled trailers and containers for use in marine services without an engine.

It appears first that there is a genuine issue of fact as to whether the Robinson letter was intended by the parties to be in fact a part of the lease transaction.

In *Trucking Co. v. Dowless,* 249 N.C. 346, 106 S.E. 2d 510 (1959), the parties executed a trip lease agreement. The signa-

tures of the parties appeared on page 3. On page 4 there appeared an indemnity clause under which plaintiff claimed the right of indemnity. Between the signatures on page 3 and the indemnity clause, there appeared receipts for equipment to be signed by plaintiff only. At the beginning of page 4, there appeared blanks for information with respect to the driver and his helper, including a doctor's certificate as to their physical condition. The pleadings and evidence raised the question of whether the indemnity clause was a part of the lease. The Court held it should be decided on the basis of the intentions of the parties and was a question for the jury, and not to be answered as a matter of law.

If not a part of the lease transaction, then there exists a genuine issue of fact as to whether it was supported by consideration.

If the Robinson letter was indeed a valid binding obligation on the part of plaintiff, was the extension agreement supported by consideration sufficient to support a novation?

> "It is the general rule that in absence of fraud or other invalidating circumstances, the surrender of a disputed or doubtful right or claim is a sufficient consideration for an agreement compromising or settling the claim, or for an executory contract. As a general rule, however, the relinquishment of a claim that is without merit or foundation in law or equity, or in fact, is not sufficient consideration for a contract. Therefore, the relinquishment of an invalid claim is ordinarily insufficient consideration for a promise. Where, however, the claimant has an honest and reasonable belief in the validity of an invalid claim, the relinquishment of such claim is sufficient consideration to support a promise." 17 Am. Jur. 2d, Contracts, § 111, pp. 457-458.

Defendant's material presented on motion for summary judgment indicates that at the end of the original lease, plaintiff was advised that defendant wished to exercise the option to purchase, but plaintiff refused. Plaintiff's material indicates that it was not then aware of any such option. Bayer's testimony was that he left a file on the transaction containing a written memorandum when he left plaintiff's employ. Plaintiff says it gave up a valid claim to possession of the equipment. If the Robinson letter was binding, the claim was invalid. There is

at least a question of fact as to whether plaintiff's belief in the validity of the claim was an honest and reasonable belief.

For the reasons stated, it is our opinion that this litigation was too early removed from the consideration of the jury.

Reversed.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. B. J. ROGERS AND RICHARD C. POSTLE

No. 7623SC233

(Filed 4 August 1976)

1. **Schools § 1— operating correspondence school without license and bond — insufficiency of evidence**

The evidence was insufficient to be submitted to the jury on the issue of defendants' guilt of operating a correspondence school in this State without obtaining a license and executing a bond where it tended to show only that defendants contracted with a printing company in this State for the printing of materials relating to a training service in South Carolina, defendants represented that they were agents of a school located in Virginia and subsequently represented that the school had moved to South Carolina, and defendants' mail was forwarded from Virginia to Boone, North Carolina. G.S. 115-248; G.S. 115-253.

2. **False Pretense § 3— false representation — promise as surplusage**

Defendants' false representation of agency for a bona fide correspondence school which was calculated to deceive and did deceive and by which defendant obtained money from a prospective student constituted the crime of false pretense, and the additional allegation in the indictment of a promise of guaranteed employment upon successful completion of the correspondence courses was surplusage since the promise can be separated from the false representation.

3. **Criminal Law § 80— contents of records in another state — hearsay**

Testimony that another person had found that records in the Department of Education for the State of Virginia failed to show that a permit for a preparatory school had been issued for a correspondence school allegedly represented by defendant was hearsay and not admissible under the public records exception to the hearsay rule.

APPEAL by defendants from *McConnell, Judge.* Judgments entered 23 October 1975, Superior Court, ASHE County. Heard in the Court of Appeals 14 June 1976.

Defendant Rogers was charged in five separate indictments with feloniously obtaining property from five different individuals by false pretenses. In four of these cases, the alleged false pretenses were (1) that he represented a correspondence school and (2) that upon completion of the school's instruction and passage of a civil service examination, the Federal Government must provide the individual with a job. In the other case the alleged false pretenses were (1) that he represented the correspondence school and (2) that upon completion of the course the individual would receive a card which guaranteed a job upon presentation of the card to anyone for whom he wanted to work. By five warrants defendant Rogers was also charged with the misdemeanor of operating a correspondence school without obtaining a license or executing a bond. The dates in these warrants correspond with the dates in the indictments.

Defendant Postle by two separate indictments was charged with feloniously obtaining property by false pretenses in that he represented a correspondence school and that upon completion of the course and passage of a civil service examination, the Federal Government must provide the individual a job. By two corresponding warrants defendant Postle was also charged with the misdemeanors of operating a correspondence school without a license and a bond.

At trial the State presented seven witnesses (McNeill, Blevins, Poe, Clark, Denny, Elliott, and Howell) who each testified that he had recently been graduated from high school; that one of the two defendants came to his home and talked with him and his parents; that the defendant stated that he had gotten the witness's name from high school; that defendant stated that he represented Center Training Service of Danville, Virginia; that defendant played a tape concerning the civil service examination and related job opportunities; that defendant told him how Center Training Service would help him pass the civil service examination; that neither defendant nor the tape guaranteed that he would receive a job; and that he signed a contract with defendant and paid cash. Testimony varied slightly from witness to witness as to the specific representation of employment made by the defendant. On cross-examination, each witness conceded that he had received booklets and tests by mail and a letter informing him that the school had moved from Danville, Virginia, to Greenville, South Carolina. Later,

the State called the parents of two of these witnesses to give corroborating testimony. The State presented Officer Tester who testified that on 18 July 1975 he was on the lookout for Rogers' car; that he stopped and searched a car driven by Rogers; that Rogers told him where Postle was; that he sent an officer to get Postle; that both defendants were advised of their rights; and that both refused to answer questions. The State then presented three high school guidance counselors who denied having ever given the seven students' names to either defendant. The State presented a local postmaster who testified that neither of the defendants had ever asked her to set up a civil service examination and that passing a civil service examination does not assure one of a job. The State presented the local Clerk of Superior Court who testified that no one had filed a bond for Center Training Service Correspondence School in her office. Finally, the State recalled one of the seven high school graduates to testify that he had sent a letter cancelling his contract to Danville, Virginia; and that the letter was returned to him unopened marked "Forward" and "Care of General Delivery, Boone, N. C." Nonsuit was denied.

Defendant then presented the attorney who had represented them at their preliminary hearings. The attorney's testimony tended to show, among other things, that on 24 June 1975, defendants contracted with a printing company in Boone, North Carolina, for the printing of various booklets, test cards, contracts, letterheads, etc., and that the material had Center Training Service and a street address in Greenville, South Carolina, on it. Various examples of this printed material were introduced as exhibits. Defendants called a local jailer who testified that at defendants' request he had cashed money orders made payable to Center Training Service and endorsed by defendant Postle. Defendants called Sheriff Goss and questioned him as to the investigation which he had made before obtaining warrants against defendants. The Sheriff testified that he had contacted police in Danville and Greenville and had been informed that Center Training Service did not exist; that the street addresses given in Danville and Greenville were of answering services; that the answering service in Danville was receiving mail for Center Training Service and forwarding it to General Delivery in Boone; that there was no record of Center Training Service having been licensed in North Carolina; and that there were no records in either Virginia or South Carolina of a correspondence

school having been licensed by either Center Training Service, Rogers, or Postle. Finally, defendant Rogers took the stand. He testified that he and Postle created their correspondence school in June 1975; that they rented a place in Danville to receive their mail while they decided on a permanent location for their school; that they were advised by the North Carolina Department of Public Instruction that they did not need a license to solicit North Carolina students for an out-of-state school; that they had materials printed in Boone and began soliciting students; that they reviewed their contract in detail with each student; that the contract expressly provides that no job is promised; that they decided to set up a permanent office in Greenville, South Carolina, and made arrangements to receive mail there; and they did not obtain licenses in either Virginia or South Carolina because they did not enroll students from those states.

Both defendants and Rogers and Postle were convicted of all charges and appeal from judgments imposing imprisonment.

Attorney General Edmisten by Assistant Attorney General Charles M. Hensey for the State.

Tharrington, Smith & Hargrove by Roger W. Smith for defendant appellants.

CLARK, Judge.

[1] The misdemeanor charges against both defendants Rogers and Postle are based on violations of G.S. 115-254, which provides as follows:

> *"Operating school without license or bond made misdemeanor.*—Any person or each member of any association of persons, or each officer of any corporation who opens and conducts a business school, a trade school or a correspondence school, or branch school as defined in this Article, without first having obtained the license herein required, and without first having executed the bond required, shall be guilty of a misdemeanor and be punishable by a fine of not less than one hundred dollars ($100.00), nor more than five hundred dollars ($500.00) or 30 days' imprisonment, or both, at the discretion of the court, and each day said school continues to be open and operated shall constitute a separate offense."

A correspondence school is defined by G.S. 115-245(2) as follows:

> "(2) 'Correspondence school' means an educational institution privately owned and operated by an owner, partnership or corporation conducted for the purpose of providing, by correspondence, for a consideration, profit, or tuition, systematic instruction in any field or teaches or instructs in any subject area through the medium of correspondence between the pupil and the school, usually through printed or typewritten matter sent by the school and written responses by the pupil."

Both defendants conceded that they had not obtained a license to operate a correspondence school as required by G.S. 115-248 in this State and had not executed a bond required by G.S. 115-253.

There is an apparent inconsistency between the misdemeanor and felony charges in that the misdemeanor warrants charge the operation of a correspondence school in this State without a license, and the felony indictments charge false pretense in that the defendants represented a bona fide correspondence school operating in the State of Virginia. The dates in the warrants correspond with the dates in the indictments. All of the evidence tends to show that defendants originally represented to high school graduates that they were agents of Center Training Service located in Danville, Virginia, and subsequently represented that the school had moved to Greenville, South Carolina.

The State offered no evidence that defendants opened and conducted a correspondence school in this State. The defendants offered evidence that they contracted with a printing company in Boone, North Carolina, for the printing of letterheads, booklets, test cards and other materials, all purporting to relate to Center Training Service in Greenville, South Carolina. But this evidence and evidence that the mail of defendants was forwarded from Danville, Virginia, considered in the light most favorable to the State, was not sufficient to carry the misdemeanor charges to the jury. If the State's evidence is sufficient only to give rise to a conjecture or suspicion that the crime charged was committed and that defendant perpetrated it, nonsuit must be granted. *State v. Littlejohn*, 22 N.C. App. 305, 206 S.E. 2d 373 (1974).

THE FELONIES

In North Carolina the crime of false pretense is statutory (G.S. 14-100) and the statute specifically states the crime is a felony. *State v. Fowler*, 266 N.C. 528, 146 S.E. 2d 418 (1966). The elements of the crime are (1) false representation of a subsisting fact, whether in writing, by words, or by acts, (2) which is calculated to deceive and intended to deceive, (3) which does in fact deceive, and (4) by which one obtains something of value from another without compensation. *State v. Wallace*, 25 N.C. App. 360, 213 S.E. 2d 420 (1975).

[2] Each of the indictments alleges a false representation in that the defendant represented an existing bona fide correpondence school, and further alleges a promise that upon completion of the course of instruction offered by said school and the successful passage of a "Civil Service Examination" the Federal Government must provide a job, or that upon completion of the course of instruction the student would receive a card which would require any chosen employer to give the student a job.

In the charge against the defendant Rogers relating to defrauding Perry Brent Clark (75CR1603) and the charge against defendant Postle relating to defrauding Cathy Elliot (75CR1611), the evidence does not disclose any promise of guaranteed employment after successful completion of the correspondence course. However, the crime of false pretense does not require proof of a false representation and a promise. In these two cases substantial evidence was offered which tended to show the false representation of agency for a bona fide correspondence school; that it was calculated and intended to deceive and in fact did deceive, by which the defendant obtained money from the prospective student. Under these circumstances the allegation in the indictments of the promise of guaranteed employment upon successful completion of the correspondence courses was surplusage since the promise can be separated from the false representation.

A false representation of a subsisting fact may be accompanied by a promise and may be considered as together constituting the false pretense, or if the false representation and the promise can be separated and the evidence discloses that the victim relied on the false representation of fact, the promise may be disregarded and the accused may be convicted of the false representation of fact. *State v. Phillips*, 240 N.C. 516, 82

S.E. 2d 762 (1954); 35 C.J.S., False Pretenses, § 9 (1960). We find the evidence sufficient to submit to the jury all of the felony charges against both defendants.

[3] It was incumbent upon the State to prove, as alleged in the indictments, the falsity of the representation that the defendants were agents of a *bona fide* correspondence school located in Danville, Virginia. Gene Goss, a deputy sheriff of Ashe County, testified as a witness for defendants. During the direct examination of this witness the trial judge intervened and asked the witness if he had checked with the authorities in Virginia and South Carolina; the witness replied that one Richard Waddell went to Richmond, Virginia, to the Supervisor of Preparatory Schools at the Department of Education for the State of Virginia, the custodian of the records, and after a careful inspection of the records of that office, there was no record of that school having ever been issued a permit to represent the State in a preparatory school.

This testimony about the contents of public records in other states was hearsay and was not admissible under the public records exception to the hearsay rule. See 1 Stansbury, N. C. Evidence 2d (Brandis Rev. 1973) § 153.

Having found reversible error in the admission of evidence for which we must order a new trial, we do not discuss other assignments of error which may not recur upon retrial.

The judgments in misdemeanor cases against the defendant Rogers (75CR1616, 75CR1618, 75CR1619, 75CR1620 and 75CR1622) and the judgments in the misdemeanor cases against the defendant Postle (75CR1623 and 75CR1628) are

Vacated and the cases dismissed.

For error, in the felony cases against the defendant Rogers (75CR1601, 75CR1602, 75CR1603, 75CR1605, and 75CR1606), and in the felony cases against the defendant Postle (75CR1611 and 75CR1614), we order

New trials.

Judges MORRIS and VAUGHN concur.

BETTY H. PRIVETTE v. WARREN PRIVETTE, SR.

No. 7626DC245

(Filed 4 August 1976)

1. **Divorce and Alimony § 4— parties occupying same house — cruel treatment by husband — no condonation by wife**

In an action for alimony *pendente lite*, custody of the minor child, child support and attorney fees, plaintiff did not condone allegedly cruel acts of defendant by remaining in the parties' home, since plaintiff testified that she and defendant had not shared "the same marital bed" for over a year; moreover, the burden of proving the affirmative defense of condonation must be carried by the defendant, and defendant in this case failed to carry such burden.

2. **Divorce and Alimony §§ 18, 23, 24— alimony pendente lite — child custody and support — sufficiency of findings**

The trial court's findings with respect to the parties' employment and income were sufficient to support an award of alimony *pendente lite*, but findings of fact with respect to custody and child support were insufficient to support its award.

APPEAL by defendant from *Lanning, Judge*. Judgment entered 20 November 1975 in District Court, MECKLENBURG County. Heard in the Court of Appeals 16 June 1976.

In her verified complaint, the plaintiff wife, alleging (constructive) abandonment and maintaining that defendant husband treated plaintiff and their minor child with considerable cruelty, sought alimony pendente lite, custody of the minor child, child support and attorney fees.

Defendant husband's answer denied the plaintiff's material allegations and maintained that " . . . if the Defendant has committed any indignities to the person of the Plaintiff as alleged in the Complaint, which he denies, such conduct on the part of the Defendant has been condoned by the Plaintiff continuing to live with the Defendant. That at the time this answer is being filed, the Plaintiff continues to live with the Defendant. The Plaintiff has never at any time moved out and ceased living with the Defendant. Defendant, therefore, pleads this condonation to all acts alleged in the Complaint." Furthermore, defendant counterclaimed for custody of the minor child, Amy Elizabeth Privette.

At trial, plaintiff, testifying on her own behalf, recalled the alleged indignities offered by defendant but noted that the de-

fendant had " . . . never threatened [her] and he has never slapped [her]. . . . " She further stated that on " . . . the 17th of September of 1975, Warren came in one hour before we were supposed to be in court and said that he had had an experience with the Lord and that he wanted me to call you [i.e., her attorney] and have the papers destroyed and that he would be a good he would be the best husband and father that I had ever seen, that he would make a Christian home. He had our daughter, Rita, who is a Christian with him at that time. He promised to be a good husband, father, and make a Christian home so that our friends could come back to our home again. The past two years no visitors have been in our home. After September 17, 1975, he has been a better person to Amy. But as far as I am concerned I well, there's just no love. I mean I love Warren as a human being, as God's creation, but he has destroyed all the love that I had for him as a wife. Both before September 17, 1975 and after that date, we have continued to sleep in separate bedrooms."

Plaintiff, on cross-examination, testified that "[i]n the summertime of 1974 my husband spent one night in the house next door. I did not move out of the bedroom until the last of June of 1974. Before I moved out of the family bedroom in June of 1974, we occupied the same bed. I told my husband that up to that time I had never refused him sex any time he wanted it. I am still living in the same house with him and I spent last night there."

At the close of the plaintiff's evidence, the defendant moved for a dismissal and for a judgment as of nonsuit. The motion was denied.

Subsequently, defendant, testifying on his own behalf, stated that but for one evening in the summer 1974, he and his wife " . . . have never been separated . . . . " Moreover, defendant maintained that since he " . . . had the conversation with her about the middle of September that she testified about in the presence of one of my daughters, she has been cooking our meals regular and I have been eating my meals with the family. Things have been better between us since we have had that talk. I would say that conversation that we had in the middle of September lasted about ten minutes. Both of us agreed that we would try to make things work in the future. I told her I'd appreciate it if we would work things out where this baby

could grow up under two parents. She agreed upon it and she immediately called Mr. Roberts. We both agreed that both of us would work together and try to make this a Christian home for the child. My daughter and her we all embraced ourself in the middle of the floor there and we all said prayers together in the middle of the floor and I thought it was all over with we came to an agreement. Since that time I have done my best to be a good husband to her and I have done my best to be a good father to the child." Furthermore, defendant pointed out that he has " . . . never at any time threatened any physical harm or violence to my wife. The child is being properly taken care of in our home now with both my wife and me, in a Christian home with Christian guidance and no profanity and no alcohol. I have consistently paid the full expenses of this child. Whatever the child needed, whether it was food or clothing. . . . "

In its order, the trial court found facts, inter alia, with respect to the parties' financial ability and ". . . that the defendant had rendered indignities to the person of the Plaintiff to render her condition unbearable and intolerable, all without sufficient provocation on the part of the said Plaintiff and is entitled to relief by reason of North Carolina General Statute 50-16.2(7). The Court finds as a fact that the Defendant has cursed the Plaintiff, has accused her of infidelity, has made light of her Christian beliefs and practices and has sought and refused to communicate with the Plaintiff, has embarrassed her in front of other persons causing her great humiliation, has threatened the person of Brenda Privette, the daughter, with a fire poker and has showed favoritism to other persons in the neighborhood over the above his own family and has done all these acts without provocation on the part of the Plaintiff. The Court further finds as a fact that on numerous occasions the defendant would absent himself from the home and would not inform the Plaintiff of his whereabouts and would not come to the home for the meals that were regularly cooked by the Plaintiff, thus causing the Plaintiff to be concerned and worried, all without provocation on the part of the Plaintiff. That the Plaintiff and said minor child born of the union are actually and substantially dependent upon the Defendant for their maintenance and support and are substantially in need of maintenance and support from the Defendant." Moreover, the trial court, though finding both parents fit and proper persons for

purposes of custody, awarded custody of the child to the plaintiff. Based on the foregoing facts, the trial court concluded that the ". . . Defendant rendered indignities to the person of the said Plaintiff to make her life unbearable and intolerable and is entitled to relief as set forth herein." In addition to awarding plaintiff custody of the child, the court awarded plaintiff child support and alimony pendente lite and gave to defendant visitation rights with the child. From the order defendant appealed.

Other facts necessary for decision are set out below.

James L. Roberts for plaintiff appellee.

Lacy W. Blue for defendant appellant.

MORRIS, Judge.

[1] Defendant, contending that the trial court erred in denying his motion to dismiss, maintains that plaintiff condoned the acts of defendant. We disagree.

The plaintiff testified that she no longer shared "the same marital bed" with defendant as of June 1974 and in view of this testimony "[t]here is no condonation from the fact that the parties continue to live under the same roof if it affirmatively appears that they do not have sexual intercourse." 1 Lee, N. C. Family Law, § 87, pp. 332-333 (1963). Also see: 27A C.J.S., Divorce, § 61, p. 207; 32 A.L.R. 2d, Condonation of Cruel Treatment as Defense to Action for Divorce or Separation, § 12, pp. 107-176.

One Court, moreover, goes even further, stating that ". . . sexual cohabitation after acts of cruelty cannot be considered as condonation in the sense in which it would be after an act of adultery. The effort to endure unkind treatment as long as possible is commendable; and it is obviously a just rule that the patient endurance by one spouse of the continuing ill treatment of the other should never be allowed to weaken his or her right to relief." *Brown v. Brown,* 171 Kan. 249, 232 P. 2d 603, 605-606 (1951). We consider the reasoning in *Brown* correct and adopt its interpretation of the law in this area.

Moreover, the affirmative defense of condonation must be carried by the defendant. See: *Cushing v. Cushing,* 263 N.C. 181, 139 S.E. 2d 217 (1964). Here, the defendant simply has

not carried this burden. In short, there is no merit to defendant's contention that the evidence indicated condonation as a matter of law.

[2] Defendant next contends that the trial court failed to make sufficient findings of fact with respect to alimony pendente lite, custody and child support.

In its findings of fact, the trial court, in pertinent part, found:

> "5. That the defendant is an able-bodied self-employed person engaged in the upholstery business in a shop located on the premises at 126 Pineville Road, Matthews, North Carolina.
>
> 6. That the Plaintiff is unemployed and in the past had been employed as a nursery teacher with the Matthews Baptist Church and earned for the tax year ending 1972, $1,378.00, and earned $2,420.00 for the tax year 1973 and had earnings of $1,495.00 for the tax year 1974 and the Plaintiff is presently unemployed outside the home and works in the home. The Defendant for a nine-week period for August and September, 1975, had a net profit of $1,391.13, an average income per week of $154.17. The Defendant's net profit for the tax year of December 31, 1974, was $4,376.65.
>
> 7. Based upon the foregoing findings concerning the earnings of the respective Plaintiff and Defendant, the Court finds the fact that the said Plaintiff is a dependent spouse as defined in North Carolina General Statute, Section 15-16.1(3) and the said Defendant is the supporting spouse as defined in North Carolina General Statute, Section 50-16.1(4).
>
> 8. . . . That the Plaintiff and said minor child born of the union are actually and substantially dependent upon the Defendant for their maintenance and support and are substantially in need of maintenance and support from the Defendant.
>
> 9. The Plaintiff and Defendant are both fit and proper persons to have the care, control and custody of the said minor child born of this marriage, to wit: Amy Elizabeth Privette, however, the Court finds the fact that it is in

the best interest of the said minor child, Amy Elizabeth Privette, that she be placed in the exclusive care, control and custody of the said Plaintiff.

10. The Court finds as a fact that the said Defendant, Warren Privette, Sr., is a fit and proper person to have reasonable visitation of the said minor child born of this union, to wit: Amy Elizabeth Privette.

. . .

13. The Court after having found as a fact that the Plaintiff is the dependent spouse and the Defendant is the supporting spouse and the Plaintiff is without means to defray costs of this action, however, in the discretion of the Court, counsel fees are denied Plaintiff's counsel. The Court finds as a fact that the Defendant has earnings and/or an estate from which he can pay reasonable amounts for alimony pendente lite for the Plaintiff and child support."

The court directed defendant to pay to plaintiff $175 per month child support and $125 per month alimony pendente lite and further directed that plaintiff and the child should have the use of one of the houses owned by plaintiff and defendant and that plaintiff should have the exclusive use of one of the automobiles owned by defendant. The court refused to award counsel fees for plaintiff.

Insofar as the defendant contends error with respect to alimony pendente lite, we find no merit to his contention. See: *Eudy v. Eudy*, 288 N.C. 71, 215 S.E. 2d 782 (1975). Cf: *Newsome v. Newsome*, 22 N.C. App. 651, 207 S.E. 2d 355 (1974); *Manning v. Manning*, 20 N.C. App. 149, 201 S.E. 2d 46 (1973). However, we agree with defendant that the findings of fact with respect to custody and child support are insufficient. See: *Powell v. Powell*, 25 N.C. App. 695, 214 S.E. 2d 808 (1975); *Manning v. Manning, supra.*

The order of the trial court is, therefore, affirmed in part and reversed in part. A new hearing is necessary with respect to custody and child support so that proper findings and conclusions thereon may be entered. See *Powell v. Powell, supra.*

Affirmed in part; reversed in part.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. WILLIAM NATHANIEL MANGUM

No. 769SC106

(Filed 4 August 1976)

1. **Criminal Law § 84; Searches and Seizures § 1— constitutional arrest — arrest illegal under N. C. law — admissibility of seized evidence**

Items seized incident to defendant's arrest were admissible in evidence where the arrest was constitutionally valid since the officer had probable cause to make the arrest, notwithstanding the arrest was in violation of G.S. 15A-402 because made by a city officer more than one mile outside the city boundary.

2. **Criminal Law § 76— confession — intoxication of defendant**

The evidence supported the court's determination that defendant was not intoxicated when he made a confession to the sheriff where the sheriff testified that defendant appeared to be highly intoxicated when placed in the county jail at 3:00 or 4:00 a.m., that he did not question defendant until 7:30 or 7:45 p.m., and that defendant appeared to be sober at such time.

3. **Criminal Law § 111— written instructions on elements of crimes**

Defendant was not prejudiced when the court gave the jury sealed envelopes containing memoranda on the essential elements of the crimes which the jury could consider.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 1 October 1975 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 24 May 1976.

The defendant, William Nathaniel Mangum, was charged in a bill of indictment, proper in form, with the armed robbery of Beatrice Pendleton on 1 February 1975. In a separate indictment, proper in form, defendant was also charged with assault on Beatrice Pendleton on 1 February 1975 with a deadly weapon with intent to kill inflicting serious injury.

The defendant was arraigned on 29 September 1975 and entered pleas of not guilty to both charges. He also moved, pursuant to G.S. 15A-974, to suppress certain evidence, to wit: a confession obtained during a custodial interrogation and any clothing and contents thereof which the defendant was wearing when he was taken into custody.

There was a hearing after which Judge Godwin made findings and conclusions and entered an order denying defendant's motion.

At trial, the State offered evidence tending to show the following: Beatrice Pendleton was working in "Pendleton's Grill" near Franklinton, North Carolina, at approximately 11:45 p.m. on 31 January 1975 when the defendant came in and asked for cigarettes. Mrs. Pendleton testified:

> "When I turned for the cigarettes, he grabbed me by the hair, beat me to the floor with his fists, used five drink bottles on me, he beat me with a bottle, he said, 'I'm going to kill you,' and beat me some more with the bottles and picked me up and threw me out the side door. I couldn't get up."

The defendant took approximately $25.00 in currency and "a piece of bent wire" from the cash register. Deputy Sheriff William Hunter and Sheriff William T. Dement investigated the robbery and assault. In addition to finding numerous pieces of broken glass which had blood on them, Hunter found, approximately 300 yards from the grill, a "blue jean type jacket," which had blood on it.

The defendant was arrested early in the morning on 1 February 1975. Officer James Frazier searched defendant incident to the arrest and found a pocketfull of coins and a "bent wire" on the defendant.

Sheriff Dement questioned the defendant on the evening of 1 February and obtained a statement from the defendant. In the statement, the defendant admitted robbing Mrs. Pendleton and hitting her with his fists but denied hitting her with a bottle. He also admitted taking off his jacket and throwing it away as he ran from the Grill.

At the close of the State's evidence, the District Attorney announced it would only seek a conviction for common law robbery on the armed robbery charge.

The defendant testified in his own behalf. He offered evidence tending to show that he had gone to the Ponderosa Club on the evening of 31 January where he gambled and got drunk. He thought he passed out at the Club and has no recollection of robbing or assaulting Mrs. Pendleton. He did not remember what happened to his clothes or even what he was wearing. When he was arrested, the coins in his pocket were some money he had won gambling, and he made the bent wire himself to use

as a key to his grandmother's house. He did not remember being informed of his rights or making or signing a statement for Sheriff Dement.

The jury returned verdicts of guilty of common law robbery and guilty of assault with a deadly weapon inflicting serious injury. From judgment entered that defendant be imprisoned for ten years on each charge, the sentences to run consecutively, defendant appealed.

Attorney General Edmisten by Associate Attorney Acie L. Ward for the State.

Robert H. Hobgood for defendant appellant.

HEDRICK, Judge.

The defendant's first two assignments of error relate to the trial court's denial of his motion to suppress. After the hearing on defendant's motion, Judge Godwin made findings summarized as follows:

Officers of the Sheriff's Department contacted Franklinton city policeman James Frazier via a police radio in the early morning of 1 February 1975 and requested him to investigate a reported break-in at the home of Annie Boylorn. He drove to Boylorn's home, three miles outside the Franklinton city limits. When he was approximately one hundred yards from her home, he observed defendant "standing at the door . . . with one hand on the closed door and his head leaning against his arm, which was resting on or near the door." It appeared to Frazier that defendant was attempting to break into the house, so he went to defendant and arrested him. Incident to the arrest, Frazier searched the person of the defendant and found a .22 caliber blank pistol, coins, a chapstick, a bent wire, and a book of matches.

Frazier transported defendant to the Franklinton police department where he was met by Sheriff Dement who arrested defendant for the armed robbery and assault of Beatrice Pendleton, the crimes charged in this case. Dement also took custody of the coins, pistol and other items found on the defendant.

When Dement transferred defendant to the county jail around three or four o'clock in the morning, he appeared to be highly intoxicated. Dement did not attempt to question defend-

ant until 7:30 or 7:45 that evening. The defendant then appeared to be sober. Dement advised him of his rights guaranteed by the Constitution in accordance with *Miranda*. The defendant said that he understood his rights and signed a written waiver-of-rights form. Initially, he denied any knowledge of the assault and robbery of Mrs. Pendleton; but when informed that there was a witness who saw him at Mrs. Pendleton's, defendant agreed to tell what happened. He then made an incriminating statement to Dement who copied it down, read it back to defendant, and had the defendant sign it.

There were no exceptions to the court's findings.

[1] Defendant contends the court erred in allowing "into evidence a gun, coins and a bent wire obtained from the person of the defendant during a search incident to an unlawful arrest."

G.S. 15A-402 provides in pertinent part the following:

> *"Territorial jurisdiction of officers to make arrests.—*
>
> * * *
>
> (c) City Officers, Outside Territory.—Law-enforcement officers of cities may arrest persons at any point which is one mile or less from the nearest point in the boundary of such city."

See also G.S. 160A-286.

Under this statute, Officer Frazier had no authority to arrest defendant at Ms. Boylorn's home three miles outside Franklinton. The technical violation of this statute, however, does not necessarily require exclusion of evidence obtained in the search incident to the arrest. The Fourth Amendment only protects the defendant against *unreasonable* searches. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961); *Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed. 2d 1669 (1960); *State v. Ratliff*, 281 N.C. 397, 189 S.E. 2d 179 (1972). "An unlawful arrest may not be equated, as defendant seeks to do, to an unlawful search and seizure." *State v. Eubanks*, 283 N.C. 556, 560, 196 S.E. 2d 706, 709 (1973). Under the Constitution, an arrest is valid when the officer has probable cause to make it. Whether probable cause exists depends upon whether the facts and circumstances known to the officer at the time "were sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense."

Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed. 2d 142 (1964); *State v. Eubanks, supra.* Judge Godwin's conclusion that Frazier "had probable cause to believe that the defendant was attempting to feloniously break or enter the Boylorn home" is supported by the facts found. We agree that probable cause did exist to arrest defendant. As was stated in *Eubanks, supra* at 560:

> "The issue then is this: When an arrest is Constitutionally valid but illegal under the law of North Carolina, must the facts discovered or the evidence obtained as a result of the arrest be excluded as evidence in the trial of the action? The answer is *no.*" (Emphasis added.)

It also makes no difference that the evidence seized is introduced in a trial of a crime different from the one for which defendant was arrested. *State v. Eppley*, 282 N.C. 249, 192 S.E. 2d 441 (1972). We hold the findings made by Judge Godwin after a hearing on defendant's motion to suppress support the conclusion that the items seized as a result of the search were admissible.

[2] Defendant also contends the court erred in allowing into evidence the confession made by defendant to Sheriff Dement on the evening of 1 February 1975. He argues that the defendant was under the influence of intoxicating beverages at the time the confession was made. The length of time which passed between the arrest and the interrogation of defendant, and Sheriff Dement's observation of defendant at the time of the interrogation, supports the conclusion "[t]hat the defendant was sober at 7:30 p.m. on February 1, 1975." Defendant was informed of his right to remain silent and his right to have counsel present when Dement questioned him. He stated that he understood his rights and he voluntarily, knowingly, and intelligently waived his rights before talking with Sheriff Dement. The court properly denied the defendant's motion to suppress the evidence obtained as a result of the search and his confession.

[3] Defendant assigns as error the action of the trial court "in providing the jury with memorandums placed in envelopes, the contents of which were not read in open court to the jury, nor read by the defendant nor counsel for the defendant."

In his charge Judge Godwin instructed the jury with regard to each of the offenses and the applicable lesser included

offenses. He also instructed them with regard to the essential elements of each offense they might consider. He then handed the jury sealed envelopes which he said contained memoranda on the essential elements of each offense. He instructed them to first consider the robbery charge and to open the envelope applicable to that charge. After reaching a verdict in that charge, they were to consider the offense of assault with a deadly weapon with intent to kill inflicting serious injury. While considering that offense, they were to open the applicable envelope containing the memorandum of the essential elements of the offense. If they found defendant not guilty of that offense, they were to consider, in descending order, the lesser included offenses of the assault charge. As they considered each lesser offense, they were to open the applicable envelope containing the memorandum of the essential elements of the crime being considered. Judge Godwin stated that the memoranda were to aid the jury in separating the different offenses to enable them to reach their verdict.

The defendant did not object to this procedure nor have copies of the memoranda been made a part of the record on appeal. Defendant has not shown prejudicial error. *See State v. Frank,* 284 N.C. 137, 200 S.E. 2d 169 (1973).

Defendant assigns as error the denial of his motion for judgment as of nonsuit. When the evidence is considered in the light most favorable to the State, it is sufficient to require submission of these cases to the jury and to support the verdicts. This assignment of error is overruled.

We have carefully examined defendant's other assignments of error and find them to be without merit.

The defendant had a fair trial free from prejudicial error.

No error.

Judges PARKER and ARNOLD concur.

MARY RUTH EVANS v. WARREN HARVEY STILES

No. 7630SC274

(Filed 4 August 1976)

1. **Automobiles § 83— pedestrian in parking lot — failure to see backing car — contributory negligence**

Plaintiff was not contributorily negligent as a matter of law in failing to see defendant's car as it backed toward her in a parking lot in a direction against the ordinary and usual flow of traffic for the particular lane.

2. **Evidence § 44; Damages § 13— necessity for medical treatment — admissibility of medical bills**

Plaintiff's evidence was sufficient to show that hospital and drug bills she incurred were reasonably necessary for the treatment of the injuries she sustained as a result of defendant's negligence, and such bills were properly admitted in evidence.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 6 November 1975 in Superior Court, CHEROKEE County. Heard in the Court of Appeals 18 June 1976.

This is a civil action wherein the plaintiff, Mary Ruth Evans, is seeking damages from the defendant, Warren Harvey Stiles, allegedly resulting from injuries incurred when plaintiff was struck by an automobile owned by defendant and driven by defendant's wife, Ruby Stiles.

At the close of plaintiff's evidence, the defendant made a motion for directed verdict on the grounds, among other things, that "the evidence of the plaintiff, taken in the light most favorable to the plaintiff, discloses contributory negligence on the part of the plaintiff as a matter of law." The motion was denied and the following issues were submitted to and answered by the jury as indicated:

"1. Was Ruby Lee Stiles the agent of the defendant and acting in the course and scope of her agency at the time complained of in plaintiff's complaint?

ANSWER: Yes.

2. Was the plaintiff injured and damaged by the negligence of Ruby Lee Stiles as alleged in plaintiff's complaint?

ANSWER: Yes.

3. If so, did the plaintiff, by her own negligence, contribute to her own injuries and damages as alleged in defendant's answer?

ANSWER: No.

4. What amount, if any, is plaintiff entitled to recover of the defendant?

ANSWER: $5,000.00."

From a judgment entered on the verdict, defendant appealed.

Jones, Jones and Key by James U. Downs for plaintiff appellee.

Morris, Golding, Blue and Phillips by William C. Morris, Jr., for defendant appellant.

HEDRICK, Judge.

Defendant assigns as error the denial of his motion for a directed verdict. At trial the plaintiff offered evidence tending to show the following:

The plaintiff, who worked at the Peachtree Products plant in Cherokee County, N. C., arrived for work at approximately 6:45 a.m. on 18 June 1974 to begin work on the 7:00 a.m. shift. She parked in the parking lot maintained for employees and visitors which was in front of the plant.

The vehicular access lane in the parking lot has directional arrows painted on the pavement which indicate the intended flow of traffic—one-way—through the parking lot. There are marked parking spaces which slant in the direction of on-coming traffic to enable easier entrance from the access lane as you travel around the lot.

After plaintiff parked, she had to walk through the parking lot in order to get to the plant. There were no marked passageways for pedestrians. Before crossing the lot, she waited at the rear of her car for two cars to pass, the second of which was the defendant's. She then looked to her left, the direction of on-coming traffic. Seeing no traffic, she began to cross. As she crossed, she spoke a greeting to a friend, then looked back to

her right and saw defendant's car, being driven by his wife, Ruby Stiles, backing toward her. She then testified:

> "[J]ust as I turned around, I spotted the car, and it was so close that I couldn't get from one side to the other side of the car, so I wheeled around, I jerked around, and my body backwards, to try to keep from being hit at the bottom, which I did throw my hands on the car to try to brace myself from being hurt or knocked down. * * *
>
> [B]y the time she stopped, it was against me."

Ruby Stiles testified, as plaintiff's witness, that she came into the parking lot and began to pull into a space. As she turned in she saw that the space was occupied by a small car, so she put the car in reverse and began to back out. She looked behind her but did not see plaintiff, although she had seen her as she passed by her while driving toward the parking space. Suddenly, Kathleen Elliot, who was riding with Mrs. Stiles, "hollered" and Mrs. Stiles stopped. She then put the car in forward gear and proceeded on until she found a parking space.

Mrs. Elliott testified that she saw plaintiff as they came into the lot. Although she did not see her when Mrs. Stiles backed-up, she hollered because she knew plaintiff was behind the car. She also testified that Mrs. Stiles had not begun to pull into the space and that when she first stopped it had not been necessary for her to back-up in order to proceed forward in the parking lot.

[1] Citing *Holloway v. Holloway,* 262 N.C. 258, 136 S.E. 2d 559 (1964); *Blake v. Mallard,* 262 N.C. 62, 136 S.E. 2d 214 (1964); *Rosser v. Smith,* 260 N.C. 647, 133 S.E. 2d 499 (1963); *Campbell v. Doby,* 19 N.C. App. 94, 198 S.E. 2d 25 (1973); and *Byrd v. Potts,* 12 N.C. App. 262, 182 S.E. 2d 837 (1971), defendant contends the evidence in the present case discloses that plaintiff failed to keep a proper lookout for motor vehicles using the access lane and that the failure on the part of the plaintiff was contributory negligence as a matter of law barring her claim. We do not agree. Each of the cited cases is distinguishable on its facts. In each of these cases, the plaintiff was attempting to cross a public highway where motor vehicles ordinarily travel in both directions. In the instant case, plaintiff was walking in one of the vehicular access lanes of a parking lot, where the traffic ordinarily moved in one direction, when

she was injured as a result of defendant's automobile *backing* in a direction against the ordinary and usual flow of traffic in that particular lane. Whether the evidence disclosed that plaintiff was negligent in failing to see defendant's car as it backed toward her and whether such negligence was one of the proximate causes of her injuries was for the jury to determine. We cannot say that plaintiff's failure to see the defendant's car and avoid the injuries sustained was contributory negligence as a matter of law. The court properly denied defendant's motion for a directed verdict.

[2] Citing *Taylor v. Boger,* 27 N.C. App. 337, 219 S.E. 2d 290 (1975), *reversed* 289 N.C. 560, 223 S.E. 2d 350 (1976) and *Ward v. Wentz,* 20 N.C. App. 229, 201 S.E. 2d 194 (1973), defendant contends the court erred in allowing "the plaintiff to introduce into evidence the amount of the drug bill and the drug bill itself and the amount of the physician's bill and the bill itself without any evidence to the effect that medical attention she received was reasonably necessary for the treatment of injuries resulting from the incident of 18 June 1974, AND that the charges were reasonable in amount." In reversing the Court of Appeals decision in *Taylor v. Boger, supra,* the Supreme Court at 289 N.C. 560, 567, 223 S.E. 2d 350, 355 (1976), said:

> "The Court of Appeals sustained this ruling, stating:
>
> ' . . . We find no error in the court's rulings. There is no evidence to show the necessity for plaintiff's treatment in Ohio (where she lived for awhile after the accident in North Carolina). Furthermore, there is no evidence that the medical expenses paid in Ohio were reasonable in amount.'
>
> The Court of Appeals relied on *Ward v. Wentz,* 20 N.C. App. 229, 201 S.E. 2d 194 (1973). Factually, that case is distinguishable from the case at bar. In that case, there was no evidence that plaintiff had been referred by any doctor in North Carolina to any doctor in Florida. Her testimony was as follows:
>
> ' " While I was in Florida, I did incur medical expenses for injuries sustained in the accident. The first doctor that I saw was Dr. Hilliard, and he charged me $50.00 and $62.00 that $112.00; the next doctor was Dr. Jackson and Dr. Annis, which together was $299.00, they are in the

Watson Clinic. The next was Lakeland General Hospital for x-rays $65.00. The next was the physical therapist who charged $12.00 and $10.00, that's $22.00. Dr. Smith charged $12.00 for x-rays. Lee Memorial Hospital bill was $32.00. I bought prescription drugs while I was in Florida and paid approximately $80.00 for those . . . . "'

There was no showing of the need for such services or that these services were required by the injury which she had sustained in the accident involved in that case.

In the present case, Dr. Adams instructed plaintiff to consult an orthopedic surgeon in Ohio if she continued to have pain. Plaintiff then testified that she did see the orthopedic surgeon in Ohio suggested by Dr. Adams, and would have testified, if allowed to do so, that he treated her for the same injury for which Dr. Adams had treated her. She would have further outlined the treatment given her and the amount of the bills incurred for such treatment. Dr. Adams testified that on plaintiff's return to North Carolina, he treated her for the same injuries for which he had treated her prior to the time she went to Ohio. These facts clearly distinguish this case from *Ward v. Wentz, supra.*"

We find the facts in the present case, likewise, distinguishable from the facts in the *Wentz* case.

Plaintiff testified that after the incident in the parking lot, she went to work but had to leave early because of the "pain." That afternoon she went to see Dr. Tanksley. His office was full, however; so he directed her to go to the hospital emergency room, which she did. She was admitted to the hospital and stayed four days under the care of Dr. Tanksley. After being discharged, she was still in pain; so she remained in bed except to go see Dr. Tanksley. She was hospitalized again in July for "serious pain in [her] back, about [her] rib cage, up, and [her] neck and head," and remained there for fourteen days. She remained out of work until 8 October 1974. During the period of time from 18 June until the time of trial, she has continued to see Dr. Tanksley and has taken medication for the pain.

Plaintiff then introduced her medical bills and a record of her drug charges showing hospital expenses of $457.25 and $1,535.55 and drug expenses of $678.65. Plaintiff also intro-

duced a deposition of Dr. Tanksley wherein he testified that her pain and injuries "could very well" have been caused "by the jerking and twisting of her body in response to defendant's car." He also testified that in his opinion the hospitalization, office visits, and treatment he administered were necessary for treating the plaintiff's condition.

We think the evidence here clearly discloses that the hospital and drug bills incurred by plaintiff and introduced into evidence were reasonably necessary for the treatment of the injuries she sustained as a result of the defendant's negligence. *Taylor v. Boger, supra.*

In the trial in the superior court, we find

No error.

Judges BRITT and MARTIN concur.

VANITA B. STANBACK v. FRED J. STANBACK, JR.

No. 7619SC254

(Filed 4 August 1976)

Injunctions § 13— preliminary mandatory injunction — separation agreement — claim for tax refund

Where a separation agreement required plaintiff wife to make a "valid effort" to claim on her 1968 federal and state tax returns deductions for counsel fees set by the court to be paid to her counsel and required defendant husband to pay the difference in plaintiff's federal and state income taxes by virtue of her inability to make such deduction, the Internal Revenue Service and the N. C. Department of Revenue disallowed plaintiff's deductions for counsel fees, in a suit brought by defendant the Internal Revenue Service agreed to refund the sum paid by plaintiff for deficiency tax and interest assessed in disallowance of her deduction for counsel fees if plaintiff filed a claim for refund by 12 February 1976, and plaintiff brought an action against defendant for breach of the agreement to pay the difference in taxes, the trial court in plaintiff's action properly allowed defendant's motion for a preliminary mandatory injunction requiring plaintiff to file before 12 February 1976 a claim for refund based on the deduction of counsel fees, notwithstanding plaintiff contends such a claim would prejudice another claim she has filed for a refund based on deductions for child support and an automobile.

Stanback v. Stanback

APPEAL by plaintiff from *Lupton, Judge.* Order entered 30 January 1976, Superior Court, ROWAN County. Heard in the Court of Appeals 16 June 1976.

This action was brought for recovery of damages caused by the defendant's alleged breach of separation agreement which plaintiff and defendant had executed in 1968 in settlement of litigation which had been pending since 1965. The agreement provided that any attorneys' fees set by the court to be paid to counsel for the plaintiff would be the obligation of the plaintiff. At the same time the parties entered a supplementary agreement in the form of a letter from counsel for defendant to counsel for plaintiff, which provided:

> "We agree that if Vanita Stanback is unable to deduct the fees she is required to pay you during 1968 that Fred Stanback will pay to her through you the difference in the federal and state income tax that she is required to pay by virtue of being unable to make this deduction for attorneys' fees.
>
> It is understood that a valid effort will be made by Mrs. Stanback to claim such deductions and that the tax returns for 1968, both federal and state, will be prepared under the supervision of one of you."

The Superior Court ordered defendant to pay to plaintiff her counsel fees in the sum of $31,000.00.

Pursuant to the agreement, plaintiff filed returns claiming a deduction for $31,000.00 in attorneys' fees, but $28,500.00 was disallowed by both the Internal Revenue Service and North Carolina Department of Revenue. Plaintiff, after tax lien was filed and her property seized, paid $13,371.10 in additional federal income tax plus interest. Plaintiff alleged that defendant refused to pay the additional taxes assessed for the year of 1968 and prayed for consequential damages in the sum of $250,000.00.

In August 1973 defendant filed action in the U. S. District Court against the United States of America and the plaintiff (1) to recover the sum of $29,362.93 plus interest which defendant alleged was illegally assessed by Internal Revenue Service in disallowing alimony payments to plaintiff in the sum of $45,500.00, and (2) to restrain the United States of America from the seizure and sale of plaintiff's home under the

tax lien ($13,371.10) against her in the disallowance of her claim for counsel fees paid in the year of 1968. Defendant alleged that Internal Revenue Service had taken inconsistent positions in disallowing his deduction of $45,500.00 alimony paid by him to plaintiff for the year of 1968, and at the same time disallowing her deduction of $31,000.00 which she paid from her alimony for counsel fees.

On 16 January 1976, defendant filed a motion for a preliminary mandatory injunction requiring plaintiff to file a claim for refund with Internal Revenue Service for federal taxes in the sum of $18,099.51, which she paid as a result of the 1968 deficiency assessed in disallowance of her claimed deduction for counsel fees. In support of this motion defendant attached a letter from the Chief Counsel of Internal Revenue Service, dated 4 November 1975 and addressed to counsel for defendant, in which it was admitted that Internal Revenue Service had taken inconsistent positions, that defendant had agreed that the $31,000.00 paid by him in 1968 to plaintiff was not alimony, and that the Attorney General of the United States had agreed to a settlement of defendant's action on this basis and would refund the sum paid by plaintiff for deficiency tax and interest if she filed a claim for refund by 12 February 1976. Defendant also supported the motion with affidavit of George L. Little, Jr., attorney for defendant, setting out that plaintiff was the only person who had standing to file the claim and unless filed by 12 February 1976, the claim would be barred.

At the hearing on this matter plaintiff testified that she had filed a claim in 1973 for the refund in question and an additional refund of taxes paid on $14,500.00 in 1968 which she received for child support and an automobile but was treated as income by Internal Revenue Service; that defendant contested her claim, and that if she filed a claim for refund as demanded by defendant, her claim for refund for taxes paid on the $14,500.00 would be prejudiced.

Defendant testified that in the settlement of his action against the United States, it was agreed that the $31,000.00 paid to plaintiff would not be treated as income to her but the settlement did not include any agreement relating to any claim for deduction of the 1968 payment of $14,500.00.

The trial court entered a preliminary mandatory injunction ordering plaintiff to apply for the refund in the sum of

$18,099.51 by 12 February 1976 and required defendant to post bond in the sum of $30,000.00 for the security of plaintiff. Plaintiff appealed.

Walser, Brinkley, Walser & McGirt by Walter F. Brinkley for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson by Norwood Robinson and George L. Little, Jr.; Kluttz & Hamlin by Clarence Kluttz for defendant appellee.

CLARK, Judge.

In the separation agreement of 1968 the plaintiff agreed to make a "valid effort" to claim as a deduction the $31,000.00 which was paid to her by defendant for her counsel fees in the calendar year of 1968. Plaintiff did claim this deduction in both her federal and state income tax returns.

In his letter of 4 November 1975 the Chief Counsel of Internal Revenue Service, proposing settlement of the action by this defendant against the United States based on the claimed deduction for counsel fees, wrote: "To avoid a whipsaw and protect the revenue, the District Director took inconsistent positions in disallowing the claimed alimony deductions to Fred Stanback and in taxing to Vanita Stanback all of Fred's payments to her."

The Chief Counsel added, "[Y]ou propose to settle the alimony issue out of court by conceding that the amount of $31,000.00 attributable to attorney's fees, is not alimony . . . . [T]he pending offer had been accepted on behalf of the Attornel General. Upon being advised of such settlement, the District Office would solicit a refund claim from Vanita and, when filed, would proceed to adjust the return and have the overpayment processed and refund check issued. The period within which the claim may be filed expires February 12, 1976."

It, thus, appears clear that if the plaintiff would file a refund claim based on the deduction of $31,000.00 for counsel fees in the year of 1968, the claim would be honored and a refund check issued. The plaintiff, in her settlement agreement of 1968 with defendant, contracted to make a "valid" effort to claim this deduction. In the sense used in the settlement agreement, we construe a "valid" effort to mean a "reasonable"

effort, and that plaintiff agreed to pursue those remedies that a reasonable person would pursue in seeking a refund for an overpayment of taxes.

The plaintiff filed a claim based on the $31,000.00 counsel fee deduction, and also deductions of $10,000.00 for child support and $4,500.00 for an automobile in 1973. In his settlement letter of 4 November 1975, the Chief Counsel of Internal Revenue Service, referring to plaintiff's 1973 claim, wrote: "But the claim for refund of the original tax, obviously, had been filed out of time." The plaintiff disputes this statement of Chief Counsel, testifying that the District Director had advised her that the claim was filed in apt time. The plaintiff further contends that to now file a claim based only on the counsel fee deduction would prejudice her claim for refund based on additional deductions of $14,500.00 for child support and automobile.

We decline to rule on the validity of plaintiff's 1973 claim, either on whether the claim was filed in apt time or whether she would be prejudiced in her 1973 claim by now filing a claim as proposed in the settlement letter of Chief Counsel. In view of admitted inconsistent rulings on the claims of plaintiff and defendant and the purported disagreement within the Internal Revenue Service as to whether plaintiff's 1973 filing was made in apt time, we studiously avoid forecasting any final determination by the Internal Revenue Service. However, we must consider the evidence offered by both plaintiff and defendant in weighing the equities and determining whether the trial court properly granted the mandatory injunction.

The defendant seeks a preliminary mandatory injunction requiring plaintiff to file a claim before 12 February 1976 for a refund of $18,099.51 based on a deduction of $31,000.00 for counsel fees. A mandatory injunction requires the party enjoined to do a positive act. As a rule a mandatory injunction will not be made as a preliminary injunction, except where the injury is immediate, irreparable and clearly established. *Ingle v. Stubbins,* 240 N.C. 382, 82 S.E. 2d 388 (1954). "The issuing court, after weighing the equities and the advantages and disadvantages to the parties, determines in its sound discretion whether an interlocutory injunction should be granted or refused. The court cannot go further and determine the final rights of the parties which must be reserved for the final trial

of the action. [Citations omitted.] 'In passing on the validity of an interlocutory injunction the appellate court is not bound by the findings of fact made by the issuing court, but may review the evidence and make its own findings. . . . ' " *Telephone Co. v. Plastics, Inc.*, 287 N.C. 232, 235, 214 S.E. 2d 49, 51 (1975). The burden is upon the appellant to show error by the issuing court. *Huggins v. Board of Education*, 272 N.C. 33, 157 S.E. 2d 703 (1967).

In our opinion the contractual duty of the plaintiff to make a reasonable effort to pursue her claim for a refund requires that she, the only person with standing to do so, file a claim for a 1968 tax refund pursuant to the settlement proposal contained in the 4 November 1976 letter of the Chief Counsel of the Internal Revenue Service. Plaintiff does not question the authenticity of the letter which makes this proposal. In weighing the equities and the advantages and disadvantages to plaintiff and defendant, we find that the tax refund in the sum of about $18,099.51 may be irretrievably lost, to the disadvantage of defendant who was required by the 1968 separation agreement to reimburse plaintiff for the loss if she was unable to deduct the counsel fees. If the plaintiff is prejudiced in her claim for refund based on deduction of $14,500.00 in 1968 paid to her for child support and automobile, she is protected against loss by the $30,000.00 bond which the trial court required of defendant. Further, plaintiff's action against defendant for damages for failure to reimburse her is still pending, and this decision does not determine any other right of the parties. In "balancing conveniences" we find that the preliminary mandatory injunction will restrain threatened irreparable injury to defendant's rights, and that the plaintiff has not carried the burden of showing error by the trial court. The order of the trial court in the issuance of the preliminary mandatory injunction is

Affirmed.

Judges MORRIS and VAUGHN concur.

JAMES L. DARNELL, PETITIONER v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND HIGHWAY SAFETY; NORTH CAROLINA STATE HIGHWAY PATROL

No. 7610SC170

(Filed 4 August 1976)

Administrative Law § 5; Master and Servant § 10— dismissed highway patrolman — review of administrative decision improper

Since petitioner, a dismissed highway patrolman, had no constitutional right to a hearing before the respondent agencies prior to his dismissal, the superior court had no jurisdiction to review the action taken by respondents in dismissing petitioner and should have dismissed this action.

APPEAL by respondents from *Bailey, Judge.* Judgment entered 16 December 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 27 May 1976.

This action originated from the 30 October 1973 suspension of James L. Darnell from the State Highway Patrol. Mr. Darnell was suspended for his conduct on the night of 29 October 1973 which resulted in a criminal warrant being issued on 31 October charging him with felonious larceny.

On 11 December 1973 Mr. Darnell submitted a written notice of appeal to the Department of Motor Vehicles. On 13 December 1973 Lieutenant Colonel E. W. Jones responded and notified Mr. Darnell that the Secretary of the Department of Transportation had been conferred with and that the Secretary concurred in the suspension.

Darnell's criminal case was called for trial on 20 January 1975 and was nonsuited on 21 January 1975. On 27 February 1975 Darnell filed a petition under the provisions of G.S. 143-307 et seq. to have the Court review the action of the Department of Transportation and Highway Safety and the State Highway Patrol.

Darnell alleged in his petition that he was discharged from the Highway Patrol for violation of General Order 20, Subsection 4a, Section 10a and 10b of the Policies and Procedures Manual of the State Highway Patrol which is published under the authority of G.S. 20-187. Darnell further alleged that the provisions under which he was suspended were unconstitutionally vague.

It was asserted in his petition that Darnell had been discharged because he had been charged with felonious larceny "and the attendant publicity, over which the Petitioner had no control was a source of embarrassment for the Respondents." Darnell further asserted that there was no basis for the charges against him, and that he was not guilty of the conduct violative of General Order 20.

On 5 March 1975 respondent agencies filed a motion to dismiss alleging that the petitioner failed to comply with the G.S. 143-309 requirement that petitions for review be filed within 30 days after a written copy of the decision is served upon the person seeking review.

The matter was heard before Judge Sammie Chess on 22 April 1975. Judge Chess held that "the provisions of G.S. 143-309 relied on by the respondent as grounds for dismissal are invalid due to respondents' failure to comply with the provisions thereof relevant to service of the order of dismissal by the administrative agency." Judge Chess ordered that petitioner be granted an administrative hearing pursuant to Article 33 of Chapter 143 of the General Statutes.

On 30 April 1975 respondents answered Darnell's petition and denied his allegations and prayed that the petition be dismissed.

A hearing was held in Cumberland County before Hargett T. Kinard, Assistant Secretary, North Carolina Department of Transportation. The evidence at the hearing, in essence, tended to establish that on the night of 29 October 1973 Tom E. Smith, a friend of petitioner's, came to petitioner's home driving a truck loaded with building supplies. Smith told Darnell that he had been drinking and that he had limited driving privileges and that he could not legally drive "with the odor of intoxicating beverage on his breath." Smith asked Darnell to drive him home because the truck was heavily loaded in the rear and was subject to swerve if the building supplies shifted positions. Darnell saw no indications from Smith's conduct that he was under the influence of alcohol, and he consented to drive the truck for Smith.

Deputy Sheriff Lonnie Hubbard stopped the truck and inquired of Darnell as to whom the building materials belonged. Darnell replied that the materials belonged to Smith and then

identified himself as a highway patrolman. Hubbard allowed Darnell to continue and he drove Smith home, helped unload the truck, and then rode back to his house in Smith's car.

Deputy Sheriff Hubbard later discovered that building materials were missing from an apartment construction site, and he reported the larceny to the Sheriff's Department for investigation. At 1:30 a.m. Sergeant McCullen of the Highway Patrol called Darnell at his home and asked him to voluntarily come to the Sheriff's office. After consulting with his attorney, Darnell made a statement proclaiming his innocence of the larceny. Darnell told the authorities that there were more building materials in his yard which Smith probably placed there. Darnell was immediately suspended from his duties as a State Patrolman.

Smith testified at the hearing that he pled guilty of larceny and that Darnell in no way participated in the theft.

The Secretary of Transportation affirmed the action of the Commander of the State Highway Patrol in permanently suspending James L. Darnell. The Secretary concluded (1) that Darnell operated a truck belonging to Tom E. Smith loaded with stolen building supplies; (2) that Darnell used his position as a State Highway Patrolman to divert Deputy Hubbard's inquiries regarding stolen building material being transported by him and Tom Smith; (3) that Darnell knowingly permitted Tom Smith to operate a motor vehicle in violation of the Motor Vehicles Laws; and (4) that Darnell caused embarrassment and grave damage to the image of the State Highway Patrol.

Petitioner appealed the Secretary's decision to superior court. Upon a hearing in superior court the Secretary's order was reversed and petitioner was ordered reinstated. The trial judge concluded that the provisions of General Order 20 for which petitioner was suspended for violating were unconstitutionally vague. The trial judge further concluded that the Secretary's conclusions did not provide a proper basis for petitioner's discharge, and that the evidence in the record regarding petitioner's knowingly possessing stolen goods, aiding and abetting a theft, knowingly permitting violation of Motor Vehicles Laws, and causing embarrassment to the State Patrol was not material or substantial. Respondents appealed to this Court from the trial court's order granting reinstatement.

Smith, Geimer & Glusman, P.A., by William S. Geimer, for petitioner appellee.

Attorney General Edmisten, by Special Deputy Attorney General William W. Melvin, for respondent appellant.

ARNOLD, Judge.

This proceeding began when petitioner sought judicial review, under Article 33 of Chapter 143 of the General Statutes, of action by the respondent agencies in discharging him as a member of the State Highway Patrol. Petitioner does not contend that any of his constitutional rights have been violated, but that certain regulations of the Policies and Procedures Manual of the State Highway Patrol in effect in 1971 were unconstitutionally vague. He also contends that respondents had no basis to discharge him.

Petitioner is not a public official elected for a specific term. He is not under contract with respondents to work for any specified duration, and he has no constitutional right to continue employment as a member of the Highway Patrol. See *Bishop v. Wood*, ___ U.S. ___, ___ S.Ct. ___ (decided 10 June 1976); *Slochower v. Board of Ed. of N. Y.*, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956); *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971). Moreover, no statute in North Carolina confers upon this petitioner tenure "or the right to judicial review of an administrative action terminating the employment." *Nantz v. Employment Security Comm.*, 290 N.C. 473, 226 S.E. 2d 340 (1976).

Article 33 of Chapter 143 of the General Statutes, entitled "Judicial Review of Decisions of Certain Administrative Agencies," in effect at the time petitioner began this action [subsequently repealed effective 1 February 1976] defines "administrative decision" to mean "any decision, order or determination rendered by an administrative agency in a proceeding in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an opportunity for agency hearing." In the recent case of *Nantz v. Employment Security Comm., supra,* the North Carolina Supreme Court said that it was clear that this statute "does not contemplate judicial review of a simple administrative action such as the [among others] . . . discharge of an employee, but contemplates a determination of rights and duties

of persons . . . subject to the regulatory authority of the agency. Thus, unless the petitioner had a constitutional right to an agency hearing prior to her dismissal, the action of the Employment Security Commission in discharging her was not subject to judicial review and its motion to dismiss should have been allowed by the Superior Court."

In the instant case petitioner had no constitutional right to a hearing before the respondent agencies prior to his dismissal. The superior court had no jurisdiction to review the action taken by respondents in discharging petitioner and should have dismissed this action.

Judgment of the Superior Court is hereby vacated and the appeal is

Dismissed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA, EX REL. COMMISSIONER OF INSURANCE v. COMPENSATION RATING AND INSPECTION BUREAU OF NORTH CAROLINA

No. 7610INS36

(Filed 4 August 1976)

Master and Servant § 80— workmen's compensation rates — remand of proceeding

Workmen's compensation rate proceeding is remanded to the Commissioner of Insurance for appropriate findings of fact from the present record to support his conclusion that "the current rates are reasonable, adequate, not unfairly discriminatory and in the public interest."

APPEAL by defendant from decision and order of the Commissioner of Insurance entered 14 October 1975. Heard in the Court of Appeals 4 May 1976.

This proceeding involves a filing on 18 June 1974, by the Compensation Rating and Inspection Bureau (Bureau) with the Commissioner of Insurance of North Carolina (Commissioner). The filing seeks approval of a revisal (an increase) for workmen's compensation insurance rates.

At the public hearings the Bureau presented testimony and exhibits in support of the filing, and there was also testimony in opposition to the filing. The Commissioner did not approve the proposed rate increase but entered instead the following order:

"This cause came on to be heard and was heard at a series of public hearing sessions beginning on February 12, 1975 and concluding on May 5, 1975, before the undersigned Commissioner of Insurance, following due notice to all parties, for the purpose of considering the captioned filing of the Compensation Rating and Inspection Bureau of North Carolina.

After giving full and careful consideration to all of the evidence in the record and to arguments of counsel, the undersigned Commissioner of Insurance makes the following:

FINDINGS OF FACT

1. That the present workmen's compensation insurance rate levels and rating values in North Carolina were established by an Order of the former Commissioner of Insurance dated January 3, 1973, with those rate levels and rating values becoming effective December 1, 1973.

2. That the Compensation Rating and Inspection Bureau of North Carolina (hereinafter called the Compensation Bureau) made a filing for revised workmen's compensation insurance rates on June 18, 1974.

3. That said filing proposed a 9.0% reduction in rates based on a review of workmen's compensation loss experience in North Carolina and further proposed a 0.4% reduction in rates based on a reduction in loss adjustment expense, which reductions considered together, result in a 9.4% reduction.

4. That said filing proposed rate increases based on the alleged effect of legislative changes in benefits under the Workmen's Compensation Act and further based on the alleged effect of a hospital rate and medical fee change and an assessment change made by the North Carolina Industrial Commission.

5. That the net result of all the proposed rate changes in Findings of Fact 3 and 4 was a proposal for an average increase of 11.8% in the overall level of workmen's compensation insurance rates and rating values.

6. That said filing proposed, in addition to said 11.8% rate increase, other changes, among which are the following:

A. An increase from the present 44% to 156% in the United States Longshoremen's and Harbour Worker's Compensation Coverage Percentage applicable only in connection with Rule I(c) of Section XV—'Maritime Employment' of the Manual,

B. Certain changes in the excess loss premium factors, and

C. Certain changes in the minimum premium formula.

7. That the proposed rate and rating value changes referred to in Finding of Fact 4 are not based on any actual loss or underwriting experience and that there is no credible evidence in the record justifying said changes.

8. That the changes referred to in Finding of Fact 6 were not justified by the Compensation Bureau and that there is no credible evidence in the record justifying said changes.

9. It is hereby found that a reasonable allowance for the effect of those factors referred to in Finding of Fact 4 on loss experience would be an allowance of an increase in the rates and rating values sufficient to offset the 9.4% rate reduction referred to in Finding of Fact 3.

10. That after giving consideration to the favorable loss and loss adjustment expense experience reported by the Compensation Bureau and the legislative and Industrial Commission fee and assessment changes, it is found that the current rates are reasonable, adequate, not unfairly discriminatory and in the public interest.

CONCLUSIONS OF LAW

1. That under the provisions of Article 2 of Chapter 97 of the General Statutes of North Carolina, the Com-

pensation Bureau is responsible for compiling workmen's compensation insurance rates for submission to the Commissioner of Insurance for approval.

2. That under the provisions of said Article workmen's compensation insurance rates must be reasonable, adequate, not unfairly discriminatory, and in the public interest.

3. That after giving consideration to the favorable loss and loss adjustment expense experience reported by the Compensation Bureau and the legislative and Industrial Commission fee and assessment changes, it is concluded that the current rates are reasonable, adequate, not unfairly discriminatory and in the public interest.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. That the June 18, 1974 filing of the Compensation Rating and Inspection Bureau of North Carolina be and the same is hereby disapproved.

2. That the rates and rating rules currently in effect for workmen's compensation insurance in North Carolina be and hereby are left unchanged as the approved rates and rating rules for such insurance in North Carolina.

ISSUED under my hand and official seal this the 14th day of October, 1975.

s/ JOHN RANDOLPH INGRAM
Commissioner of Insurance"

The Bureau appealed from the Commissioner's decision.

Attorney General Edmisten, by Assistant Attorney General Isham B. Hudson, Jr., for plaintiff appellee.

Allen, Steed and Pullen, P.A., by Thomas W. Steed, Jr., for defendant appellant.

ARNOLD, Judge.

The principal question for determination by the Commissioner was whether the increased rates filed by the Bureau were fair, reasonable and adequate. G.S. 97-100(a).

If the Commissioner determines, as he did in this case, that the rates are excessive, inadequate, unreasonable, unfairly

discriminatory or are otherwise not in the public interest, he has authority to issue an order altering or revising the rates. G.S. 97-104.1. Any such order or decision by the Commissioner that the rates filed are excessive, inadequate, unreasonable, unfairly discriminatory or otherwise not in the public interest, may be appealed to this Court, and any such order has to be based upon findings of fact and conclusions of law thereon. G.S. 58-9.4.

In the instant case the order disapproving the increased rates was an order or decision within the meaning of G.S. 97-104.1. The Commissioner determined that the rates filed were excessive, unreasonable, unfair or otherwise not in the public interest since he concluded that the rates currently in effect were reasonable, adequate, not unfairly discriminatory and in the public interest. However, his order is not based upon appropriate findings of fact as required, in our opinion, by G.S. 58-9.4. Without such findings of fact the order cannot be judicially reviewed by this Court.

This proceeding is remanded to the Commissioner of Insurance for appropriate findings of fact from the present record to support his conclusion that "the current rates are reasonable, adequate, not unfairly discriminatory and in the public interest."

Remanded.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA EX REL. NORTH CAROLINA UTILITIES COMMISSION v. TRANSYLVANIA UTILITY COMPANY

No. 7610UC93

(Filed 4 August 1976)

Utilities Commission § 6— availability charge — power of Commission to disapprove

By enacting G.S. 62-133.1(b), the General Assembly proscribed the Utilities Commission's power to disapprove charges called for in uniform contracts between utilities and nonuser property owners if the charges do not exceed those expressly authorized by statute; therefore, the order of the Utilities Commission approving a rate

schedule which included a monthly availability charge of $3.00 per month while the uniform contract between the utility and property owner called for a $5.00 monthly charge is reversed, since $5.00 was also the sum of the minimum rate to user customers of the utility.

APPEAL by applicant from an order of the North Carolina Utilities Commission issued 1 July 1975. Heard in the Court of Appeals 12 May 1976.

The appeal stems from a proceeding filed 2 March 1973, in which applicant sought a franchise and approval of a rate schedule as a water and sewer utility. As finally approved, the rate schedule included a monthly "availability" charge of $3.00 per month for "nonusers" of water and a like amount for sewer. The applicant had previously entered into uniform contracts with nonusers calling for the payment of a minimum monthly "availability charge" of $5.00 for each service.

Weaver, Noland & Anderson, by William Anderson, for applicant appellant.

Commission Attorney Edward B. Hipp and Assistant Commission Attorneys John R. Molm and Wilson B. Partin, Jr., for respondent appellees, North Carolina Utilities Commission.

VAUGHN, Judge.

The thrust of appellant's argument is that the Commission did not follow the statutory rate making formula. The specific attack on the order is the reduction of the "availability" charge.

The concept of "availability" charges of water and sewer companies is of relatively recent origin. It appears to have arisen in instances where tracts of land were developed for recreational homes. Most all of the lots would be sold in a relatively short time, but few of the purchasers would immediately build on their lots. The practice has been for the developer and the purchasers of the lots, by uniform contract, to agree that the property owner would pay a fixed monthly sum prior to the time that the owner desired a tap connecting the waterwork system to his lot. Thereafter, the property owner became a customer of the utility and was required to pay the lawfully established rates charged by the utility.

The North Carolina Utilities Commission originally took the view that there was no "legal basis for allowing rates to

persons not actually receiving the service." *State of North Carolina, ex rel, Utilities Commission v. Carolina Forest Utilities, Inc.*, Docket No. W-361, 28 June 1973. On the appeal of that case to this Court, the Commission argued in its brief as follows:

> "The Commission agrees that it has jurisdiction to fix, establish or allow just and reasonable rates subject to certain limitations. GS 62-130 is a general grant of power. GS 62-133(a) establishes certain limitations to that general grant:
>
> > 'Sec 62-133. HOW RATES FIXED—(a) In fixing the rates for any public utility subject to the provisions of this chapter, other than motor carriers, the Commission shall fix such rates as shall be fair both to the public utility and *to the* CONSUMER.' (Emphasis added.)
>
> This provision directs the Commission to fix just and reasonable rates that shall be fair both to the public utility and to the CONSUMER. The legislature used the word 'consumer' as opposed to 'customer' or some other less descriptive word. Therefore, the Commission shall fix just and reasonable rates for consumers. There is no provision allowing the Commission to fix rates for nonconsumers or nonusers. Quite the contrary is true. There is an implied prohibition against fixing rates for anyone besides consumers. Appellant is not presently furnishing water to the lot owners against whom he seeks an availability charge since they have not actually tapped onto its line with their own plumbing whether it be residential or merely a yard faucet. Consequently, they are not consumers under the normal understanding of the word or the intention of the Legislature. A consumer is defined as one who uses or consumes economic goods and so diminishes or destroys their utilities. 9 Words and Phrases, 'Consumer,' P 12.
>
> The lot owners against whom appellant seeks to impose an 'availability charge' are not consuming or using up any commodity of the appellant. Therefore, the individuals against whom appellant seeks to impose an availability charge are clearly protected against such charge as they do not fall within the proper statutory bounds as provided in GS 62-133(a) for those against whom rates may be charged.

Neither are the nonusers or nonconsumers receiving a service furnished by a public utility as provided for in GS 62-3(27):

> 'Service' means any service furnished by a public utility, including any commodities furnished as a part of such service and any ancillary service or facility used in connection with such service.'

Appellant may be providing somewhat of a benefit to the nonusers; however, he is not providing any service or commodities to them so as to enable the Commission to classify them as consumers and levy a charge against them."

Thereafter, at its next session, House Bill 1491 was introduced in the General Assembly on 31 January 1974. The final version of that bill was ratified as Chapter 956 of the Session Laws of 1973, Second Session, 1974. That chapter, in pertinent part, is as follows:

> "AN ACT ESTABLISHING GUIDELINES FOR ESTABLISHING CHARGES AND SETTING RATES OF WATER AND SEWER UTILITIES.
>
> The General Assembly of North Carolina enacts:
>
> Section 1. Paragraph (a) of Section 133 of Chapter 62 of the General Statutes of North Carolina is hereby amended by deleting the words 'other than motor carriers' and by adding in lieu thereof the words 'other than motor carriers and certain water and sewer utilities.'
>
> Sec. 2. There is hereby added to Chapter 62 of the General Statutes of North Carolina a new section G.S. 62-133.1 which shall read as follows:
>
> '§ 62-133.1. Small water and sewer utility rates.—(a) In fixing the rates for any water or sewer utility, the Commission may fix such rates on the ratio of the operating expenses to the operating revenues, such ratio to be determined by the Commission, unless the utility requests that such rates be fixed under G.S. 62-133(b). Nothing in this paragraph shall be held to extinguish any remedy or right not inconsistent herewith. This paragraph shall be in addition to other provisions of this Chapter which relate to public utilities generally, except that in cases of

conflict between such other provisions, this section shall prevail for water and sewer utilities.

(b) A water or sewer utility may enter into uniform contracts with non-users of its utility service within a specific subdivision or development for the payment by such non-users to the utility of a fee or charge for placing or maintaining lines or other facilities or otherwise making and keeping such utility's service available to such non-users; or such a utility may, by contract of assignment, receive the benefits and assume the obligations of uniform contracts entered into between the developers of subdivisions and the purchasers of lots in such subdivisions whereby such developer has contracted to make utility service available to lots in such subdivision and purchasers of such lots have contracted to pay a fee or charge for the availability of such utility service; provided, however, that the maximum non-user rate shall be as established by contract, except that the contractual charge to non-users of the utility service can never exceed the lawfully established minimum rate to user customers of the utility service.'

Sec. 3. Except as herein amended, the provisions of Chapter 62 of the General Statutes of North Carolina shall remain in full force and effect. To the extent that other laws or clauses of law are in conflict with the provisions of this act, such laws and clauses are, to that extent, hereby repealed."

The act is codified as G.S. 62-133.1.

It seems clear to us that the new statute was enacted in direct response to the Commission's conclusion that nonusers were not "consumers" of the utility and that an "availability charge" could not be made to property owners solely because they owned land in an area served by the utility.

The Utilities Commission exercises a function of the legislative branch of the government, but only that portion of the legislative power conferred upon it by legislative act. It may not act in an instance where the Legislature has, by specific legislation, preempted such action.

G.S. 62-133.1(b) expressly provides that a water or sewer utility may enter into uniform contracts with nonusers for payment by nonusers of a "fee or charge" for making the utili-

ties' service available to nonusers. The parties have stipulated that appellant's application for utility service together with the lot sales agreements into which they are incorporated "constitute . . . 'uniform contracts with nonusers . . .' within G.S. 67-133.1(b)." The act further expressly provides that the maximum nonuser rate "*shall* be as established by contract" but "can never exceed the *lawfully established minimum rate* to user customers of the utility service." (Emphasis added.) The uniform contract between the utility and property owner in the development calls for a $5.00 monthly charge and that sum is identical to the minimum rate to user customers of the utility.

By enacting the foregoing legislation, the General Assembly, we believe, proscribed the Commission's power to disapprove charges called for in uniform contracts between utilities and nonuser property owners if the charges do not exceed those expressly authorized by the statute. It appears to us that the foregoing result was the legislative intent at the time the legislation was ratified and made effective on 7 March 1974.

Subsequently, on 20 March 1974, this Court filed its opinion on the appeal from the Commission's order in Docket No. W-361, 28 June 1973. The opinion is reported in *Utilities Comm. v. Carolina Forest Utilities,* 21 N.C. App. 146, 203 S.E. 2d 410. The Court held that, under the statutes [as they existed prior to the enactment of G.S. 62-133.1] the Commission had authority to allow the use of an availability charge in a rate schedule of a water utility. The Court did not consider the act now in question and, because of its recent enactment, was most likely unaware of its existence.

In supplemental briefs, filed at the request of this Court, both parties to the appeal oppose our interpretation of G.S. 62-133.1 as set out in this opinion. We hold to the view, however, that the opinion reflects the legislative intent at the time the bill was enacted. If more careful reasoning calls for a change in the statute, that action should be left to the General Assembly.

The order of the Utilities Commission is reversed. The cause is remanded for reconsideration of the proposed rate schedule in accord with the views expressed in this opinion.

Reversed and remanded.

Judges MARTIN and CLARK concur.

TOWN OF SOUTHERN PINES, A MUNICIPAL CORPORATION v. DR. JACK MOHR, GEORGE PATE, DR. JOHN BENDER, THE REVEREND DON HARRIS, WILLIAM F. McLEAN, MRS. BETTY J. ROBERTS, MAYO BROWN, HAROLD HINSON, W. F. FLOYD, C. R. WARD, THOMAS G. GIBSON, DR. KENNETH NEWBOLD, MRS. ALTA COBLE, C. E. STEVENS, JR., AND MRS. ESTHER HUNTLEY, MEMBERS OF THE BOARD OF SOUTHEASTERN REGIONAL MENTAL HEALTH CENTER; DR. A. EUGENE DOUGLAS, AS AREA DIRECTOR OF THE SOUTHEASTERN REGIONAL MENTAL HEALTH CENTER; HENRY CARPARCO, PROGRAM DIRECTOR CHILDREN'S TREATMENT CENTERS OF SOUTHEASTERN REGIONAL MENTAL HEALTH CENTER; AND SOUTHEASTERN REGIONAL MENTAL HEALTH CENTER, AN UNINCORPORATED ASSOCIATION, DEFENDANTS AND CONSTANCE M. BAKER, ADDITIONAL DEFENDANT

No. 7520SC931

(Filed 4 August 1976)

Municipal Corporations § 30— children's treatment center — governmental agency — zoning ordinance — permitted use

Defendants who operated within the area covered by plaintiff's zoning ordinance a children's treatment center for the teaching and treatment of children with emotional or mental problems were performing a public governmental function as an agency of the State, and such agency could operate at its location pursuant to the permitted use clause of Section 9.1 of the plaintiff's zoning ordinance.

APPEAL by plaintiff from *Long, Judge.* Judgment entered 26 June 1975 in Superior Court, MOORE County. Heard in the Court of Appeals 11 March 1976.

In a verified complaint filed on 6 September 1974, the plaintiff sought, inter alia, to enjoin permanently the defendants ". . . from the operation of a Children's Treatment Center on the Baker Property [also known as Duncraig Manor], or on any other property within the area covered by the Zoning Ordinance of the Town of Southern Pines wherein Children's Treatment Centers are not permitted." Apparently, the defendants leased the property ". . . for the purpose of carrying on and conducting a school and clinic for the teaching and treatment of children with emotional or mental problems and for such other purposes as are usual and customary in the conduct of such a Center."

More specifically, plaintiff maintained that this "school and clinic" violated the ". . . particular zoning district classified in the Zoning Ordinance of the Town of Southern Pines

as ', R.A. — Residential Agricultural,' and is identified . . . as Section 9.1 thereof." Further, plaintiff averred that ". . . the Residential — Agricultural District Regulations in the Ordinance of the Town of Southern Pines does not include Children's Treatment Centers as a permitted use; therefore, the use of said property and occupancy of same for the purpose of conducting a Children's Treatment Center therein is in violation of the provisions of the Zoning Ordinance above cited."

The named defendants subsequently moved to strike certain allegations and to join Mrs. Constance M. Baker, the owner and lessor of the property, as a party defendant. The court granted the motion to make Mrs. Baker a party and also granted parts of the motion to strike.

The original defendants' answer denied plaintiff's substantive allegations, maintained that the zoning ordinances violated certain constitutional rights and invoked the doctrine of sovereign immunity as an affirmative defense.

Defendant Baker's answer also denied plaintiff's substantive allegations and affirmatively sought a ruling that the defendants' use of the property was in compliance with the plaintiff's zoning ordinances.

On 23 June 1975 the original defendants moved for summary judgment. From summary judgment entered for the original defendants, plaintiff appealed.

Other facts necessary for decision are set out below.

W. Lamont Brown, William D. Sabiston, Jr., Hurley E. Thompson, Jr., and Daniel W. Pate for plaintiff appellant.

Lee and Lee, by Helen H. Madsen and W. Osborne Lee, Jr.; Seawell, Pollock, Fullenwider, VanCamp & Robbins, by James R. VanCamp; Blanchard, Tucker, Twiggs & Denson, by Howard F. Twiggs, for original defendant appellees.

MORRIS, Judge.

Plaintiff appellant contends in its sole assignment of error that the trial court erred in entering summary judgment for the original defendants. There is no merit to this contention.

Pursuant to Section 9.1 of the plaintiff's zoning ordinance, "permitted uses" include "[p]ublic buildings—town, county,

city, state, federal or regional authority." In its brief plaintiff concedes that:

> "1. The Center is a local mental health clinic administered by the Department of Human Resources under Article 2A of Chapter 122 of the General Statutes of North Carolina. It is operated under the supervision and direction of the Department of Human Resources and funded by Federal-State grants-in-aid.
>
> 2. The Center is engaged in carrying out a program for emotionally disturbed children in certain counties of the State—but not in Moore County—under the direct control and supervision of the Department of Human Resources. The defendant, A. Eugene Douglas, is Area Director of the Center and is responsible to the Regional Director of the Regional Offices of the Division of Mental Health Services, and all these persons answer to and are under the authority of the Secretary of The Department of Human Resources.
>
> 3. The Department of Human Resources supervises all activities and controls policy in the operation of Duncraig Manor. It also audits the use of State funds by the Center.
>
> 4. The Center is subject to and employs personnel under the North Carolina Personnel Act including its operation at Duncraig Manor. Motor vehicles in use at Duncraig Manor bear permanent State vehicle license tags, and gasoline tax is not charged on gasoline bought for these vehicles. The Center and Duncraig Manor have the use of consultation services of all State agencies and for these services they pay no fee.
>
> 5. Funding for the Center is about 90% from the Department of Human Resources and funding for its operation at Duncraig Manor is more than 90% from the Department of Human Resources."

Plaintiff, however, maintains that the defendants do not perform any "governmental function." We consider plaintiff's position wholly without merit and hold that the defendants' use of the Center is a permitted use under the relevant zoning ordinances for the plaintiff town.

According to the defendants' uncontroverted evidence, the Center is primarily funded and controlled through a chain of

command by the North Carolina Department of Human Resources. The facility is rented from defendant Baker and the defendant Southeastern Regional Mental Health Center is the lessee. The Southeastern Regional Mental Health Center is, according to the affidavit of the Secretary of the Department of Human Resources, ". . . under the direct control and supervision of the Department of Human Resources and that the fiscal control of such is under the Department of Human Resources; . . ." According to the affidavit of Henry Carparco, an administrator with the Southeastern Regional Mental Health Center, the defendant Center "Duncraig Manor" is part of the Southeastern Regional Mental Health Center, and the Department of Human Resources ". . . directly supervises and controls all activity and policy at the children's treatment centers and specifically at Duncraig Manor by and through written directives which originate in Raleigh at the State offices of the Department of Human Resources and are channeled through Southeastern Regional Mental Health Center to Duncraig Manor and other children's treatment centers. . . ." Furthermore, the defendants' employees are hired pursuant to the North Carolina State Personnel Act. The defendants also utilize the State's computers at no charge, follow State directives, and use State vehicles.

In short, we consider this overwhelming evidence that the defendants are performing a public governmental function as an agency of the State and that such an agency can operate at Duncraig Manor pursuant to the permitted use clause of Section 9.1 of the plaintiff's zoning ordinance.

Furthermore, the statutory authority creating this system of regional and localized mental health centers and clinics supports our conclusion that the defendants are performing governmental functions. See: G.S. 122-35.1 et seq., especially G.S. 122-35.2.

We note also that included among the permitted uses of Section 9.1 of the ordinance are "[h]ospitals, nursing homes or sanitariums provided no buildings so used shall be within three hundred (300) feet of any lot line." Sanatorium is defined as "an establishment for the treatment of the sick esp. if suffering from chronic disease (as alcoholism, tuberculosis, nervous or mental disease) requiring protracted care." Webster's Third New International Dictionary of the English Language Unabridged (1968), p. 2008.

As we stated previously in *Pridgen v. Hughes*, 9 N.C. App. 635, 638, 177 S.E. 2d 425 (1970),

> " 'Summary judgment is to avoid a useless trial. It is a device to make possible the prompt disposition of controversies on their merits without a trial, if in essence there is no real dispute as to the salient facts. . . . While a day in Court may be a constitutional necessity when there are disputed questions of fact, the function of the motion of summary judgment is to smoke out if there is any case, i.e., any genuine dispute as to any material fact, and, if there is no case, to conserve judicial time and energy by avoiding an unnecessary trial and by providing a speedy and efficient summary disposition.' " (Citations omitted.)

Here, there is no dispute as to any material facts, and therefore, the Superior Court's entry of summary judgment is

Affirmed.

Judges HEDRICK and ARNOLD concur.

NANNIE IVA JOYCE, PLAINTIFF v. CITY OF HIGH POINT, DEFENDANT AND THIRD-PARTY PLAINTIFF v. AMERICAN FRIENDS SERVICE COMMITTEE, INC., THIRD-PARTY DEFENDANT

No. 7518SC1015

(Filed 4 August 1976)

Municipal Corporations § 14— defective sidewalk — injury to pedestrian — summary judgment proper

In an action to recover for injuries sustained by plaintiff when she fell on a sidewalk allegedly negligently maintained by defendant city, the trial court properly entered summary judgment for defendants where the evidence tended to show that part of the sidewalk was elevated one to two inches, the mishap occurred during the day when the sun was shining, the defect had been present for several years, and plaintiff did not see the defect until she fell.

APPEAL by plaintiff from *Albright, Judge*. Judgment entered 18 August 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 6 April 1976.

In her complaint, filed 24 September 1974, the plaintiff alleged that on ". . . or about June 1, 1974 at approximately

1:00 p.m., the plaintiff was walking south on the High Point City sidewalks in the vicinity of Nathan Hunt Drive and South Main Street in front of Quaker Friends Center, in the City of High Point, County of Guilford, North Carolina. At said time, plaintiff stumbled and fell violently to the ground suffering severe injury as a result of an unrepaired and unmarked slab of raised concrete negligently maintained by the City of High Point." Based on the foregoing, the plaintiff maintained that she suffered certain bodily injuries and that said injuries were due to the defendant City of High Point's (hereinafter "City") negligence. Whereupon, plaintiff sought damages totalling $25,000.

Defendant City's answer, filed 9 December 1974, denied plaintiff's substantive allegations, maintained that plaintiff's injuries resulted from her own negligence, contributory or otherwise, and further averred that the plaintiff's injuries, if any, ". . . were solely caused by the negligence of the American Friends Service Committee, Incorporated, the abutting property owner to the sidewalk upon which plaintiff alleges she was injured, in that upon information and belief the American Friends Service Committee, Incorporated, negligently allowed a large tree root to grow from a tree upon its property underneath the sidewalk raising and elevating a portion thereof, and should have known of such defect, thereby giving rise to plaintiff's alleged injuries."

On 9 December 1974, the defendant City brought defendant American Friends Service Committee, Incorporated (hereinafter "AFSC"), into the original action, alleging that the AFSC's negligence entitled the City to contribution from the AFSC for "all of what plaintiff [Joyce] may recover from defendant . . ." City.

Defendant AFSC's answer, filed 3 February 1975, denied defendant City's substantive averments.

Both defendant City and defendant AFSC moved in a joint motion for summary judgment against the original plaintiff Nannie Iva Joyce on 25 June 1975, averring therein that:

> "(A) The plaintiff cannot show that the City of High Point had notice of the defect or that the City of High Point knew, or should have known from ordinary supervision, of the existence of a defect in the sidewalk that might be reasonably anticipated to cause injury to travelers.

(B) As a matter of law there was contributory negligence on the part of the plaintiff in failing to keep a lookout for her own safety and observing defects plainly visible in daylight.

(C) There is no negligence on the part of the defendants in not inspecting the sidewalk to discover a one or two inch defect since municipalities do not insure the condition of the streets and sidewalks."

In support of their motion the defendant City and defendant AFSC introduced documentation tending to show that the sidewalk was dry at the time of the 1:00 p.m. mishap, that the " 'sun was shining,' " that plaintiff carried a " 'small sack containing a few things' " and that the allegedly " '. . . defective ledge . . . was approximately one to two inches in height.' "

The defendant City and defendant AFSC also introduced portions of the plaintiff's deposition indicating that the plaintiff did not know of the alleged defect until she fell. Plaintiff explained that she did not see the alleged defect because she was ". . . just looking straight ahead. I don't go with my head down like that."

The movants also presented a photograph showing the scene of the mishap.

In opposition to the motion, plaintiff presented affidavits, answers to interrogatories and portions of her own deposition testimony. Her evidence tended to show that at the time of the mishap she was 69 years old and that she fell when she stepped between the dirt crevice or "gap" formed by the crack in the sidewalk. She also stated that she did not see the defect until she fell. Plaintiff also submitted two affidavits. According to the affidavit of Mrs. L. M. Brown, she ". . . regularly walked from my home to work along Main Street on the sidewalk where Mrs. Joyce fell. I was, at that time, well aware of the defect in the sidewalk, as it was quite obvious and evident even from a distance or from a passing car. The defective ledge upon which she tripped was approximately two inches in height and was present in the sidewalk during the time I used to walk along South Main Street to work. It has been several years since I worked on Main Street, so I am sure the defect in the sidewalk had existed for at least that period of time." Moreover, plaintiff's affidavit of Marjorie Johnson, indicated that she

too ". . . walked regularly to work along the sidewalk in front of the Quaker Friends Center near the Nathan Hunt Drive intersection along South Main Street. The sidewalk in front of the Quaker Friends Center had several defects in it which have existed for a number of years."

Based on the foregoing, the trial court entered summary judgment for both defendant City and defendant AFSC. Plaintiff appealed.

Other facts necessary for decision are set out below.

Gardner and Tate, by Raymond A. Bretzmann, for plaintiff appellant.

Bencini, Wyatt, Early & Harris, by Frank B. Wyatt and William Wheeler, for defendant and third-party plaintiff appellee, City of High Point.

Jordan, Wright, Nichols, Caffrey & Hill, by Thomas C. Duncan, for third-party defendant appellee, American Friends Service Committee, Incorporated.

MORRIS, Judge.

Plaintiff contends that the trial court erred in granting defendant City's and defendant AFSC's joint summary judgment motion. We disagree.

As we have stated previously, ". . . summary judgment is proper where it appears that even if the facts as claimed by the plaintiff are proved, there can be no recovery. . . ." *Pridgen v. Hughes*, 9 N.C. App. 635, 638, 177 S.E. 2d 425 (1970); also see *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 179 S.E. 2d 865 (1971).

In support of the motion for summary judgment defendants offered the pleadings, interrogatories and answers thereto, and portions of plaintiff's deposition. In response to the motion, plaintiff introduced the affidavit of Mrs. M. L. Brown, the pleadings, interrogatories and answers thereto, and portions of plaintiff's deposition.

The evidence indicates that as a matter of law the defendant City and defendant AFSC breached no legal duty to plaintiff. In *Bagwell v. Brevard*, 256 N.C. 465, 124 S.E. 2d 129 (1962), the plaintiff allegedly fell on a sidewalk in which the

adjoining concrete slabs left a one inch declivity. Our Supreme Court in *Bagwell* affirmed the trial court's dismissal of the action on demurrer holding at page 466 that ". . . the alleged defect or irregularity is a difference in elevation of approximately one inch between two adjacent concrete sections of the sidewalk. Defendant's failure to correct this slight irregularity did not constitute a breach of its . . . duty." Also see: *Smith v. Hickory,* 252 N.C. 316, 113 S.E. 2d 557 (1960); *Falatovitch v. Clinton,* 259 N.C. 58, 129 S.E. 2d 598 (1963); 5 Strong, N. C. Index 2d, Municipal Corporations, § 14. But cf: *Radford v. Asheville,* 219 N.C. 185, 13 S.E. 2d 256 (1941).

Furthermore, it appears from plaintiff's own evidence—which is not disputed—and particularly the affidavit of Mrs. Brown, that plaintiff was guilty of contributory negligence as a matter of law.

It appears obvious that in this case defendants have met their burden to establish the lack of a triable issue of fact. They have presented materials which would require a directed verdict in their favor if presented at trial. See *Pridgen v. Hughes, supra; Haithcock v. Chimney Rock Co., supra.* The materials presented by plaintiff in opposition have shown nothing which would defeat a directed verdict. On the contrary, plaintiff's evidence on motion for summary judgment merely solidifies defendant's entitlement to a summary judgment.

The judgment of the trial court is

Affirmed.

Judges HEDRICK and ARNOLD concur.

Stokley v. Stokley and Stokley v. Hughes

CHARLES WALTER STOKLEY, PLAINTIFF v. MARY ELIZABETH BRAY STOKLEY, DEFENDANT

MARY ELIZABETH BRAY STOKLEY, PETITIONER v. LENNIE L. HUGHES, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF CHARLES WALTER STOKLEY, RESPONDENT, AND NANCY M. JERNIGAN, RESPONDENT

No. 751DC1023

(Filed 4 August 1976)

1. **Rules of Civil Procedure § 60; Judgments § 17— divorce obtained by perjury — judgment not void**

A divorce obtained by perjury relating to the separation of the parties is not void within the purview of G.S. 1A-1, Rule 60(b)(4), but is at most only voidable.

2. **Rules of Civil Procedure § 60; Judgments § 27— divorce obtained by perjury — no fraud upon the court — motion to set aside — statute of limitations**

A divorce obtained by perjured testimony did not constitute a "fraud upon the court" within the meaning of G.S. 1A-1, Rule 60(b)(6), where defendant was personally served with process and thus had the opportunity of fully participating in the case, and the one-year statute of limitations of G.S. 1A-1, Rule 60(b)(3), was applicable to a motion to set aside the divorce for fraud.

3. **Judgments § 27— extrinsic and intrinsic fraud**

The judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time of appeal or other direct attack has expired only if the alleged fraud is extrinsic rather than intrinsic; fraud is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court.

APPEAL by petitioner from *Chaffin, Judge.* Judgment entered 13 August 1975 in District Court, CAMDEN County. Heard in the Court of Appeals 6 April 1976.

Petitioner, Mary Elizabeth Bray Stokley, appellant, brought an action, through a motion in the cause, to vacate, declare void and set aside a divorce judgment entered 17 February 1965 in Recorders Court, Edgecombe County.

Charles Stokley and Mary Stokley were married on 20 January 1940. On 31 July 1964 a divorce complaint on the grounds of two years' separation, naming Charles Stokley as plaintiff and Mary Stokley as defendant, was filed in Recorders Court, Edgecombe County. Summons was issued on 7 August 1964 and served on Mary Stokley on 10 August 1964, in Pas-

quotank County. No answer or other pleading was filed by Mary Stokley. On February 17, 1965, a judgment of absolute divorce was entered in Edgecombe County.

Charles Stokley died intestate on 4 November 1972. Mary Stokley qualified and was issued letters of administration by the Clerk of Superior Court, Camden County on 22 November 1972. Thereafter on 15 June 1973, Nancy Mae Jernigan, sister of Charles Stokley, and respondent herein, petitioned the court for removal of Mary Stokley as administratrix, citing the grounds therefor to be the 1965 divorce decree. An order to that effect was entered whereupon an administrator de bonis non was appointed on 22 February 1974.

On 10 June 1974 Mary Stokley filed a motion in District Court, Edgecombe County, pursuant to Rule 60(b)(3), (4), and (6) of the North Carolina Rules of Civil Procedure to vacate, declare void and set aside the 1965 divorce judgment. Petitioner alleged in part:

> a. That plaintiff and defendant did not, in fact, live separate and apart from each other for a period of two years next preceding the institution of the divorce action.
>
> b. That prior to and at the time of trial plaintiff and defendant were, in fact, living together in Elizabeth City, North Carolina.
>
> c. That before, during, and after the trial of the divorce action plaintiff and defendant were living together as husband and wife and continued to live together as husband and wife until plaintiff's death on November 4, 1972.
>
> d. That defendant was without knowledge or notice of the trial of this action and that notice of the trial and judgment were fraudulently concealed from her until 18 June 1973.
>
> e. That such conduct was a fraud upon the court, which fraud precluded the court's obtaining jurisdiction to enter final judgment, thereby voiding said judgment.

On 5 August 1974 the action was transferred from Edgecombe County to Camden County by consent of the parties.

The matter came on for hearing, without the intervention of a jury, in District Court, Camden County, North Carolina on

12 August 1975 at which time the court granted respondent's plea in bar to the petitioner's motion in the cause.

The petitioner appealed to the Court of Appeals.

Jennette, Morrison & Austin, by C. Glenn Austin; Twiford, Abbott, Seawell, Trimpi & Thompson, by C. Everett Thompson, for petitioner.

White, Hall, Mullen & Brumsey, by John H. Hall, Jr., for respondent Nancy M. Jernigan.

MARTIN, Judge.

The motion in the cause was made pursuant to Rule 60(b)(3), (4), and (6), Rules of Civil Procedure. The rule in pertinent part reads as follows:

> "(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.*—On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) The judgment is void;
>
> (6) Any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this section does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action."

[1] Appellant has conceded that an action grounded on Rule 60(b)(3) must be brought within one year. Thus, we consider the second ground upon which appellant relies, to wit, Rule 60(b)(4), "The judgment is void."

The court found that the judgment roll in the Edgecombe County divorce action was in all respects regular on its face. No exception was made to this finding of fact. In *Carpenter v. Carpenter*, 244 N.C. 286, 295, 93 S.E. 2d 617, 625-626 (1956), Justice Bobbitt (later Chief Justice) speaking for the Court, said, " . . . As against challenge on the ground of false swearing, by way of pleading and of evidence, *relating to the cause* or *ground for divorce*, a divorce decree, in all respects regular on the face of the judgment roll, is at most *voidable*, not void."

[2] The crucial question remaining is whether the matters alleged in appellant's motion, if taken as true, amount to "a fraud upon the court."

The motion is devoid of any allegation that appellant was prevented from fully participating in the pending divorce action. To the contrary, it is stipulated and otherwise admitted that appellant was personally served with copy of summons and copy of complaint in the Edgecombe County divorce action on 10 August 1964. Consequently, the instant case does not come within those cases when jurisdiction was purportedly acquired by false affidavit and service of process by publication. *Woodruff v. Woodruff*, 215 N.C. 685, 3 S.E. 2d 5 (1939); *Young v. Young*, 225 N.C. 340, 34 S.E. 2d 154 (1945).

All the facts alleged in the motion are drawn within the classification of intrinsic fraud. In fact, appellant's fourth allegation classifies the fraud as "intrinsic" in the following language: "That the judgment in said case was obtained by perjured testimony and false evidence resulting in intrinsic fraud on the Court and the defendant."

[3] The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time of appeal or other direct attack has expired only if the alleged fraud is extrinsic rather than intrinsic. Fraud is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. If an unsuccessful party to an action has been prevented from fully participating therein there has been no true adversary proceeding, and the judgment is open to attack at any time. A party who has been given proper notice of an action, however, and who has not been prevented from full participation, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. Fraud perpetrated under such circum-

stances is intrinsic, even though the unsuccessful party does not avail himself of his opportunity to appear before the court.

In *Pico v. Cohn,* 91 Cal. 129, 25 P. 970, cited with approval in *McCoy v. Justice,* 196 N.C. 553, 146 S.E. 214 (1929), and in *Horne v. Edwards,* 215 N.C. 622, 3 S.E. 2d 1 (1939), the Court said:

> "It must be a fraud extrinsic or collateral to the questions examined and determined in the action, and we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation, . . . when he has a trial he must be prepared to meet and expose perjury then and there."

In accord, *Thrasher v. Thrasher,* 4 N.C. App. 534, 167 S.E. 2d 549 (1969).

Upon the hearing of the plea in bar of the one year statute of limitations as set forth in Rule 60(b)(3) the trial judge correctly allowed said plea in bar and properly dismissed the motion in the cause. By so doing he in effect found that the fraud alleged in appellant's motion in the cause did not amount, even assuming proof thereof, to a "fraud upon the Court" but rather amounted to the fraud contemplated in Rule 60(b)(3).

Affirmed.

Chief Judge BROCK and Judge VAUGHN concur.

HICKORY WHITE TRUCKS, INC., PLAINTIFF-APPELLEE v. CECIL C. BRIDGES, d/b/a DIXIE TRUCK RENTALS, DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLANT v. TRAVELERS INSURANCE COMPANY, THIRD-PARTY DEFENDANT-APPELLEE

No. 7525DC952

(Filed 4 August 1976)

1. Contracts § 27— contract to repair truck — no triable issue of fact

In an action to recover for repairs made by plaintiff to defendant's truck where defendant alleged that there was a contract between plaintiff and the third party defendant whereby the third-party

defendant agreed to pay plaintiff for the repairs, the trial court properly rendered summary judgment against defendant on this issue, since the answers of plaintiff and third party defendant to interrogatories were inconsistent with the existence of any contract between the two, and defendant's affidavit and other evidence failed to set forth specific facts showing the existence of the alleged contract.

2. **Insurance § 99— settlement of insurance claim — release executed by insured — issue as to whether release procured through fraud**

In an action to recover for repairs made by plaintiff to defendant's truck where defendant alleged that third-party defendant agreed to pay plaintiff, pleadings, answers to interrogatories and affidavits presented a triable issue of material fact as to whether a release of defendant's claims and rights against third party defendant was procured through fraud.

APPEAL by Cecil C. Bridges, d/b/a Dixie Truck Rentals, defendant and third-party plaintiff, from *Vernon, Judge.* Judgment entered 15 September 1975 in District Court, CATAWBA County. Heard in the Court of Appeals 12 March 1976.

On 7 August 1972 a truck owned by Bridges was damaged in a collision with a vehicle driven by one Edward J. Klenke. Klenke was insured under a policy of automobile liability insurance issued by Travelers Insurance Company, the third-party defendant. Bridges' truck was repaired by Hickory White Trucks, Inc., plaintiff, sometime between the accident date and 28 December 1972. During this period, Bridges was in contact with M. D. Caldwell, III, an adjuster employed by Travelers. On 28 December 1972, Bridges, in consideration of the sum of $8,325.07 paid him by Travelers, executed a release of his claims and rights arising out of the collision.

On 13 January 1975, Hickory White Trucks filed this action against Bridges to recover $1,419.22, plus interest, for repairs to his truck. Bridges denied the alleged indebtedness. In his answer and in a third-party complaint filed against Travelers, Bridges alleged that Hickory White Trucks and Travelers had entered into a contract whereby Travelers agreed to pay Hickory White Trucks and Hickory White Trucks agreed to look to Travelers for payment of any alleged indebtedness. Bridges further alleged in his third-party complaint that Travelers had defrauded him into signing the release dated 28 December 1972. Specifically Bridges alleged that Travelers fraudulently represented to him that it would pay the repair charges to Hickory White Trucks.

Travelers filed an answer to the third-party complaint denying the existence of any contract between it and the plaintiff and further denying that any fraud was involved in the execution of the release. In one of its answers to interrogatories, Travelers attached a detailed listing of each item of damages it considered in paying the $8,325.07 to Bridges. One such item was $1,419.22 for repairs at Hickory White Trucks. Hickory White Trucks, in its answers to interrogatories, denied billing Travelers for the repairs to Bridges' truck and denied telling Bridges that it entered an agreement with Travelers whereby Travelers would pay for said repairs.

Motions for summary judgment were filed by Hickory White Trucks and Travelers, respectively. Bridges filed an affidavit in opposition to the motions. Both motions were granted and Bridges appealed.

Oma H. Hester, Jr., for plaintiff appellee.

Randy D. Duncan, for defendant appellant.

Stephen M. Thomas, for third-party defendant appellee.

MARTIN, Judge.

[1] Defendant contends that the court erred in granting summary judgment for Travelers because the evidence raises a genuine issue of material fact as to whether he was the third-party beneficiary of a contract between plaintiff and Travelers requiring Travelers to pay his truck repair bill.

When motion for summary judgment is made, the court must look at the record in the light most favorable to the party opposing the motion. However, when the motion is supported as provided in the rule, "An adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." G.S. 1A-1, Rule 56(e). The affidavits contemplated by the rule, both those supporting and those opposing the motion, "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." G.S. 1A-1, Rule 56(e).

In its answers to interrogatories, plaintiff stated that it never billed Travelers for the repair of defendant's truck and it never informed Bridges that it had made arrangements whereby Travelers would pay it for any such repairs. Contact between plaintiff and Travelers was limited to Travelers' verification that plaintiff's bill for repairs appeared to be proper and in order. There was no contract between the two and plaintiff assumed that Travelers would issue a settlement check made out jointly to Bridges and plaintiff because "it is common practice for an insurance company to issue checks in settlement of claims that are made payable jointly to the insured, the repair agency, and the lien holder." Hickory White's answers to interrogatories present no evidence whatsoever of any agreement such as Bridges alleged. Travelers' answers to interrogatories likewise are inconsistent with the existence of any such contract.

The motion for summary judgment having been made and properly supported, Bridges could not "rest upon the mere allegation or denial of his pleading," but was bound to "set forth specific facts" showing the existence of a genuine issue for trial. *Millsaps v. Contracting Co.*, 14 N.C. App. 321, 188 S.E. 2d 663 (1972). Bridges' affidavit and other evidence failed to set forth specific facts showing the existence of the alleged contract, and summary judgment was properly rendered against him on this issue.

[2] Defendant also contends that the pleadings, answers to interrogatories, and affidavits presented a triable issue of material fact as to whether the release signed by Bridges was procured through fraud.

In the instant case defendant Bridges, as third-party plaintiff, alleged in his complaint all the factual elements essential to constitute actionable fraud. Reading Bridges' complaint and answers to interrogatories, it appears that he signed the release under the representation that Travelers would pay the truck repair bill. Travelers, in its answer to the complaint and its answers to interrogatories, denied any misrepresentation, stated that the cost of repairing the truck was included in money paid to Bridges, and answered that it was not sure whether Bridges received a copy of the release at the time it was signed.

Travelers, as movant, has the burden of establishing that there is no genuine issue of fact on this point. The material

produced by Travelers in support of its motion for summary judgment demonstrates that it cannot bear this burden of proof. Whether Travelers procured the release from Bridges through fraud was disputed by the parties and the conflicting evidence presented an issue of fact for the jury.

Defendant argues that the court erred in granting summary judgment for plaintiff because under *Shearin v. Indemnity Co.*, 27 N.C. App. 88, 218 S.E. 2d 207 (1975), summary judgment may not be granted for the party with the burden of proof when his right to recover depends on the credibility of his witnesses.

The case at bar is distinguishable from *Shearin*, because in *Shearin* the defendant against whom summary judgment was granted had expressly denied the material allegations in the complaint. In this case, defendant has not unambiguously denied the allegations of plaintiff's complaint, and has made admissions which are sufficient to establish his liability.

Finally, defendant contends that the court should not have granted plaintiff's motion for summary judgment because the motion did not state the number of the rule under which it was made. Defendant did not raise this issue when the motion was argued and therefore waived any objection to the form of the motion. This assignment of error is overruled.

The judgment as to the defendant's first claim against Travelers, based on contract, is affirmed.

The judgment as to defendant's second claim against Travelers, based on fraud, is reversed.

The judgment on plaintiff's claim against the defendant is affirmed.

Affirmed in part and reversed in part.

Chief Judge BROCK and Judge VAUGHN concur.

CITIES SERVICE OIL COMPANY, PLAINTIFF v. JOHN POCHNA; RAPP OIL CORPORATION; ROBERT S. RAPP; EASTERN GAS CARRIERS ESTABLISHMENT; MAITAU-STIFTUNG; JULIUS TRUP; AND EUGENE HAFER, GUARDIAN AD LITEM FOR ANY AND ALL OTHER PERSONS, FIRMS, TRUSTS, CORPORATIONS AND ANY OTHER LEGAL ENTITY (INCLUDING, WITHOUT LIMITATION, THOSE WHO ARE INFANTS, INCOMPETENT PERSONS, OR UNDER ANY OTHER LEGAL DISABILITY AND THOSE WHO ARE NOT IN BEING OR OTHERWISE NOT ASCERTAINED OR KNOWN), WHO HAVE OR CLAIM TO HAVE ANY INTEREST IN THE OIL, GAS AND SULPHUR MINING LEASEHOLD ESTATE, CONVEYED BY LEASE DATED OCTOBER 28, 1957 FROM THE STATE OF NORTH CAROLINA TO J. E. FITZ-PATRICK (PERTAINING TO CERTAIN LANDS OWNED BY THE STATE OF NORTH CAROLINA IN 17 EASTERN COUNTIES OF NORTH CAROLINA), OTHER THAN THE INTERESTS IN SAID LEASEHOLD ESTATE THAT WERE SPECIFICALLY DESCRIBED, EXCEPTED AND RESERVED IN THE ASSIGNMENT DATED APRIL 12, 1971 FROM COASTAL PLAINS OIL COMPANY TO CITIES SERVICE OIL COMPANY, DEFENDANTS, v. ROBERT H. DeKAY, JR., PETROLEUM EXPLORATION CORPORATION OF NORTH CAROLINA AND COASTAL PLAINS OIL COMPANY, THIRD PARTY DEFENDANTS

No. 7610SC246

(Filed 4 August 1976)

Registration §§ 1, 5— oil and gas lease — necessity for registration — subsequent purchaser for value

An assignment of rights under a lease giving the lessee the right to remove oil and gas from certain State lands for a period of more than three years is subject to the provisions of G.S. 47-18(a) and, where unrecorded, is invalid as to a purchaser for valuable consideration of the lease whose assignment of the lease is properly recorded.

APPEAL by defendants John Pochna, Julius Trup and Eastern Gas Carriers Establishment from *Clark, (Giles R.), Judge.* Judgment entered 28 December 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 16 June 1976.

Plaintiff alleged that it is the owner of an oil and gas lease, that defendants claim an interest hostile to plaintiff and that defendants' claims are invalid. Plaintiff seeks to quiet title to its interest in the lease.

In 1957, the State of North Carolina entered into a lease agreement with J. E. Fitz-Patrick, whereby the State of North Carolina conveyed to Fitz-Patrick certain rights to explore and

take oil, gas, sulphur, casinghead gas, casinghead gasoline and no other minerals from certain lands owned by the State of North Carolina, which lands lie within 17 eastern North Carolina counties. The State Lease is of record in the office of the Register of Deeds of each of the 17 counties in which the lands are located.

Coastal Plains Oil Company thereafter acquired the rights to the State Lease through an assignment from the heirs of the original lessee. The Coastal lease is also duly recorded in all of the counties.

After its acquisition of the State Lease, Coastal entered into an agreement with Rapp Oil Corporation, dated July 11, 1969, which assigned Rapp Oil Corporation certain rights under the State Lease then owned by Coastal. The Rapp Oil Corporation agreement is not recorded in any of the 17 counties affected by the State Lease.

On 12 April 1971, Coastal, for valuable consideration, assigned its right under the State Lease to plaintiff, Cities Service Oil Company. That assignment is of record in each of the counties.

Defendants, John Pochna, Eastern Gas Carriers Establishment and Julius Trup, allege that Coastal reacquired 50% of the interest it had previously granted to Rapp Oil Corporation, leaving a 50% interest in the Rapp Oil agreement outstanding; that on or about April 8, 1971, defendant Eastern Gas Carriers Establishment acquired this remaining outstanding 50% interest in the Rapp Oil agreement, and since that time has been and is now the owner of said 50% interest; and that defendants Pochna and Trup own, hold and control all the interest in Eastern, and thereby have a direct beneficial interest in any and all assets of Eastern, including Eastern's ownership of the 50% interest in the Rapp Oil agreement.

The trial judge concluded that there was no genuine issue as to any of the following (among others) material facts:

> "(b) That recorded in the office of the Register of Deeds of each of the seventeen counties affected by plaintiff's leasehold estate, there is a good chain of title of plaintiff's leasehold estate from the State of North Carolina to J. E. Fitzpatrick to Coastal Plains Oil Company to plaintiff.

(c) That plaintiff acquired plaintiff's leasehold estate from Coastal Plains Oil Company by purchase for a valuable consideration of $300,000.00 plus other considerations.

(d) That all the interest claimed by the defendants in plaintiff's leasehold estate is based upon an agreement between Coastal Plains Oil Company and Rapp Oil Corporation, dated July 11, 1969 . . . .

(e) The Rapp Agreement was not of record in the office of the Register of Deeds of any of the seventeen North Carolina counties affected by plaintiff's leasehold estate at the time of recordation in those seventeen counties of the conveyance from Coastal Plains Oil Company vesting title in plaintiff of plaintiff's leasehold estate.

(f) The original grant or conveyance from the State of North Carolina, under which plaintiff claims, and also under which defendants John Pochna, Julius Trup and Eastern Gas Carriers Establishment claim, provides as follows:

> '14. This lease shall not be assigned in whole or in part without the written consent thereto of the lessors. . . . '

(g) The assignment to Cities Service Oil Company . . . was consented to by the State of North Carolina and the Department of Conservation and Development of the State of North Carolina.

(h) No transfer of any interest in the State lease to Eastern Gas Carriers Establishment, John Pochna or Julius Trup has been consented to by the State of North Carolina or by the Department of Conservation and Development of the State of North Carolina."

The court then made the following (among others) conclusions of law:

"1. That plaintiff's leasehold estate is a lease for more than three years of an interest in land and is subject to the operation of General Statute 47-18.

2. To the extent, if any, that the Rapp Agreement would otherwise vest in any of the defendants an interest in plaintiff's leasehold estate, the Rapp Agreement is subject to the operation of General Statute 47-18.

3. As against plaintiff, a purchaser for a valuable consideration from Coastal Plains Oil Company, the Rapp Agreement under which defendants claim is not valid in law.

4. Defendants' claim of interference by plaintiff in the contract between Coastal Plains Oil Company and Rapp Oil Corporation is not valid as a matter of law.

5. None of the defendants have alleged or shown any facts which show that any defendant has, or is entitled by law to have, any interest in plaintiff's leasehold estate."

The court then granted summary judgment in favor of the plaintiff and dismissed defendants' counterclaim. The judgment decreed that plaintiff's title to the plaintiff's leasehold estate was thereby quieted in plaintiff, free of all claims of any of the defendants. The action was retained for determination of the third party action between third party plaintiffs and third party defendants.

Defendants John Pochna, Eastern Gas Carriers Establishment and Julius Trup appealed.

Joslin, Culbertson & Sedberry, by Charles H. Sedberry, for plaintiff appellee.

Young, Moore, Henderson & Alvis, by J. Clark Brewer and Charles H. Young, for defendant appellants.

VAUGHN, Judge.

Plaintiff's recorded chain of title was supported by affidavits as was its status as a purchaser for valuable consideration. It was also established that the Rapp Oil agreement, under which defendants claim, was not of record. We believe, therefore, that the trial judge correctly concluded that only questions of law were presented.

G.S. 47-18(a), prior to the 1975 amendment, was as follows:

"(a) No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the donor, bargainor or lessor but from the time of registration thereof in the county where the land lies, or if the land is located in more than one

county, then in each county where any portion of the land lies to be effective as to the land in that county."

We hold that the judge was correct when he ruled that the document under which defendants claim is subject to the operation of that statute, and is, therefore, invalid as to plaintiff, a purchaser for valuable consideration.

Defendants offered affidavits to the effect that the Rapp Oil agreement was known in the oil business as a "farm-out agreement" or a "sharing arrangement." As one affiant explained:

> "It has been my experience that while such transactions take many forms, there is a general custom and practice in the oil and gas producing industry that such agreements are seldom recorded. The competition in the business and the need for business secrecy is such that it is generally accepted that to record such agreements would give unfair advantage to competitors as to the desirability of leasehold acreage, prices being paid for acreage and for development and other similar matters forming the basis for competition within the industry. Such agreements are variously designated as farm-out agreements, joint operating agreements, bottom hole letters, dry hole letters, acreage contributions and by other various terms descriptive of the particular transactions. Such transactions are frequently known under the Internal Revenue cases as 'sharing arrangements' and they all have in common some joint contribution of capital, labor or services in the cooperative evaluation or exploration of geological prospects for production. Such agreements are uniformly regarded as enforceable throughout the industry, and in my experience are almost never recorded, for the reasons given."

It may well be that the affiant's statement of business customs elsewhere is accurate. Nevertheless, it must me assumed that those who engage in the practice are prepared to accept its inherent risks. It seems clear to us that the document purports to convey an interest in real estate and is ineffective against subsequent record purchasers for value. This decision, of course, does not affect the rights of the parties to the Rapp Oil agreement or those who hold under them.

We have carefully considered the remaining arguments ably advanced by counsel for defendants. It suffices to say that

we hold that the conveyance from Coastal to plaintiff was not made "subject to" the unrecorded interest of Rapp Oil and that a constructive trust has not been created for defendants. The entry of summary judgment in favor of plaintiff is affirmed.

Affirmed.

Judges MORRIS and CLARK concur.

ROBERTA MOORE BRICE, PETITIONER v. LINDSEY ADOLPH MOORE, RESPONDENT

No. 7610SC206

(Filed 4 August 1976)

1. **Husband and Wife § 14— husband pays for land — tenants by entirety — presumption of gift to wife**

Where a husband pays for land and has the deed made to himself and wife as tenants by the entirety, there is a presumption of an intent on the husband's part to make a gift to the wife of an interest in the property which continues when the tenancy by the entirety is later destroyed; and respondent's declaration by affidavit that he did not intend to make a gift to his wife was insufficient to rebut this presumption.

2. **Appeal and Error § 3— constitutional question not raised in trial court — no consideration on appeal**

The Court of Appeals will not pass upon a constitutional question not raised and considered in the court from which the appeal was taken.

APPEAL by respondent from *Godwin, Judge.* Judgment entered 26 January 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 9 June 1976.

Petitioner instituted this action to have a certain land sold for partition. She alleged in her petition that she and the respondent were married on 6 September 1958 and divorced on 17 March 1975. She further alleged that while she and the respondent were married they owned as tenants by the entirety the property sought to be partitioned, and that she and the respondent now own the property as tenants in common. Peti-

tioner sought to hold her interest in the land in severalty and prayed that the court sell the land and divide the proceeds.

Respondent answered and denied the allegations in the petition. He alleged that "each of the properties described in the Petition were purchased with his money . . . [and that] the petitioner holds her interest in the said property in a resulting trust for the respondent and should be required to convey all of her right, title and interest in the said property to the respondent." Respondent alleged in his answer "that he had no intention of making a gift to the petitioner of any interest in the said property," and prayed that the petition be dismissed.

Petitioner moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. In support of her motion, petitioner submitted an affidavit stating that the parties purchased the land in controversy while they were married and used funds belonging to both parties to purchase the land. Petitioner further avowed that "to the extent that the respondent . . . supplied consideration for real estate placed in the name of the petitioner . . . that consideration and the real estate so purchased was a gift from Lindsey Adolph Moore to the petitioner, Roberta Moore Brice, who was at the time of the conveyance the wife of Lindsey Adolph Moore." She stated that the gift was absolute and that there was no agreement to hold the gift in trust for the respondent.

Respondent submitted an affidavit in which he stated that during the course of his marriage with the petitioner he purchased three parcels of land for which he paid $33,800, and that the petitioner did not contribute more than $845 toward the purchase of the properties. Respondent also stated that the properties were purchased in the names of both the parties because he had been "informed that if you were married, you had to have property deeded to both husband and wife." Respondent's affidavit asserted that he never intended to make a gift of the properties to his wife.

From the order granting summary judgment for the petitioner, respondent appealed to this Court.

Gulley and Green, by Jack P. Gulley, for respondent appellant.

Brenton D. Adams for petitioner appellee.

ARNOLD, Judge.

In ruling on a motion for summary judgment the court must look at the record in the most favorable light to the party opposing the motion. *Peterson v. Winn-Dixie,* 14 N.C. App. 29, 187 S.E. 2d 487 (1972). Respondent is the party opposing the motion here, and he contends in his first argument that summary judgment for petitioner was error because his assertion that he "had no intention to make a gift to the wife" was sufficient to rebut the presumption that the transfer was a gift to the wife. We disagree.

[1] Where a husband pays for land and has the deed made to himself and wife as tenants by the entirety, there is a presumption of an intent on the husband's part to make a gift to the wife of an interest in the property which continues when the tenancy by the entirety is later destroyed. *Honeycutt v. Bank,* 242 N.C. 734, 89 S.E. 2d 598 (1955). To rebut the presumption of gift and establish a resulting trust the evidence must be clear, strong and convincing. *Bowling v. Bowling,* 252 N.C. 527, 114 S.E. 2d 228 (1960); *Honeycutt v. Bank, supra.* The burden is upon the husband to bring forward facts overcoming the inference of an intent to give to his wife. *Shue v. Shue,* 241 N.C. 65, 84 S.E. 2d 302 (1954); *Bowling v. Bowling, supra.* [*See* Bogert, Trusts and Trustees, Second Edition, § 459, Resulting Trust; examples of facts sufficient to rebut presumption of gift.]

Respondent's declaration by affivadit that he did not intend to make a gift to his wife was merely a reiteration of the same allegation contained in his answer. When the motion for summary judgment is supported, as required by Rule 56, the adverse party may not rest upon the mere allegations or denials of his pleadings, but he has to respond, by affidavits or as otherwise provided, by setting forth specific facts showing a genuine issue. *Millsaps v. Contracting Co.,* 14 N.C. App. 321, 188 S.E. 2d 663 (1972). Respondent did not set forth specific facts showing a genuine issue for trial by declaring what his intention was with respect to the property. Moreover, his declarations of intent after the controversy arose would not be admissible in evidence. See *Smith v. Smith,* 249 N.C. 669, 107 S.E. 2d 530 (1959).

[2] In his second argument respondent contends that the North Carolina law with respect to purchase-money resulting trusts

is unconstitutional as applied to husbands and wives. He argues that there is no justifiable basis for the presumption that the land is a gift to the wife where the husband purchases land which is conveyed to husband and wife, since there is no presumption that the land is a gift to the husband if the wife purchases it and puts the title in both husband and wife. Respondent asserts the unconstitutionality of the presumption of gift to the wife, and argues that there should be no distinction between the man or woman with respect to such presumption. The record does not reflect that this constitutional argument was presented or considered by the trial court, and as a general rule this Court will not pass upon a constitutional question not raised and considered in the court from which the appeal was taken. *Carpenter v. Carpenter*, 25 N.C. App. 235, 212 S.E. 2d 911 (1975), *cert. denied*, 287 N.C. 465, 215 S.E. 2d 623 (1975).

The judgment appealed from is

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA EX REL RUFUS L. EDMISTEN, ATTORNEY GENERAL, PLAINTIFF v. J. C. PENNEY COMPANY, INC., DEFENDANT

No. 7610SC164

(Filed 4 August 1976)

Unfair Competition— unfair acts in conduct of trade or commerce — collection practices

The statute prohibiting "unfair or deceptive acts or practices in the conduct of any trade or commerce," G.S. 75-1.1, applies to repeated abusive or harassing telephone calls by a department store chain to its delinquent customers and their employers.

Judge PARKER dissents.

APPEAL by plaintiff from *Bailey, Judge*. Judgment entered 23 December 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 27 May 1976.

Plaintiff filed complaint alleging that defendant violated G.S. 75-1.1 by using unfair and deceptive acts in the conduct of commerce. It was alleged that defendant makes repeated abusive, threatening and harassing telephone calls to its delinquent credit customers. It was also alleged that telephone calls are made to defendant's customers at their places of employment even after the customer makes repeated requests that he be contacted only at home, and that calls are also "placed to credit customer's employer, informing the employer of the debt and attempting to use the employer's influence and position to force payment of the debt."

A temporary order was entered restraining defendant from making abusive or harassing contacts with its credit customers, and from contacting its customers at their place of employment after being instructed not to do so, and from contacting anyone except the customer himself concerning the debt. The order also provided for a further hearing on plaintiff's request for a preliminary injunction against the alleged conduct until final hearing on the matter.

At the hearing on the request for a preliminary injunction plaintiff presented affidavits by various credit customers and their employers concerning telephone calls by defendant's agents seeking to collect debts. These affidavits tended to show that frequent and repeated calls were made, and that threats were made concerning the placement of liens on debtor's property and garnishment of wages. It was also avowed by the affiants that defendant's agents called their employers and co-workers to discuss the debts, and that these calls were made by defendant's agents after being requested not to do so.

Defendant responded with an affidavit from its manager of the Atlanta credit office asserting that defendant employed people to contact delinquent debtors by telephone, and that defendant issued a manual describing the manner in which these contacts were to be conducted and forbidding threats and harassment. The manager avowed that he supervised adherence to the manual, that calls were not made until an account was 60 days overdue, that accommodations were made for hardship cases, and that defendant had been given no advance warning of this lawsuit.

Upon reviewing the evidence presented at the hearing the temporary restraining order was dissolved and a preliminary

injunction was denied. Defendant filed answer denying the material allegations of the complaint.

The trial court allowed plaintiff's motion to amend its order to include findings of fact and conclusions of law. In its amended order the trial court concluded that "assuming without deciding that all the allegations of the Complaints are true, the Court will not enter a Preliminary Injunction because it is of the opinion that such conduct does not fall within the purview of G.S. 75-1.1. . . ." From the entry of the amended order the State appealed to this Court.

Attorney General Edmisten, by Associate Attorney Alan S. Hirsch, for plaintiff appellant.

Smith, Anderson, Blount & Mitchell, by Henry A. Mitchell, Jr., and M. E. Weddington, for defendant appellee.

ARNOLD, Judge.

G.S. 75-1.1 provides in pertinent part as follows:

> "§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.—(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
>
> (b) The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State."

G.S. 75-1.1 is a part of Chapter 833 of the 1969 Session Laws entitled An Act to Amend Chapter 75 of The General Statutes to Provide Civil Remedies Against Unfair Methods of Competition and Unfair or Deceptive Acts or Practices in Trade or Commerce. The only question presented by this appeal is whether G.S. 75-1.1 is applicable to the debt collection activities alleged in this action.

The intent of the General Assembly in enacting Chapter 833 was to enable a person damaged by deceptive acts or practices to recover treble damages from the wrongdoer, and to

declare deceptive acts or practices in the conduct of any trade or commerce to be unlawful, and to provide civil legal means to maintain ethical standards of dealings between persons in business and the consuming public of North Carolina.

In determining the scope of G.S. 75-1.1 consideration must be given to the intent and purpose for which the legislation was enacted. G.S. 75-1.1 should be interpreted to grant broad relief against "unfair or deceptive acts or practices in the conduct of any trade or commerce." *See* 6 Wake Forest Intra. L. Rev. 1, 18-20 (1969).

To give effect to the intent and purpose for which G.S. 75-1.1 was enacted it should apply to all unfair and deceptive acts in the conduct of trade or business, including practices involved in the collection of debts. The argument presented by appellees that the phrase "trade or commerce" does not encompass debt collection activities is rejected. *Black's Law Dictionary* explains that the "words 'trade' and 'commerce,' when used in juxtaposition impart to each other enlarged signification, so as to include practically every business occupation carried on for subsistence or profit, and into which the elements of bargain and sale, barter, exchange, or traffic, enter."

Further guidance can be obtained by reviewing federal decisions on appeals from the Federal Trade Commission, "since the language of G.S. 75-1.1 closely parallels that of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1973 Ed.), which prohibits 'unfair or deceptive acts or practices in commerce.'" *Hardy v. Toler*, 288 N.C. 303, 308, 218 S.E. 2d 342 (1975). The federal courts have consistently applied the Federal Trade Commission Act to unfair or deceptive acts in the collection of debts. *Mohr v. FTC*, 272 F. 2d 401 (1959); *Dejay Stores v. Federal Trade Commission*, 200 F. 2d 865 (1952); *Bennett v. Federal Trade Commission*, 200 F. 2d 362 (1952); *Silverman v. Federal Trade Commission*, 145 F. 2d 751 (1944); *In re Floersheim*, 316 F. 2d 423 (1963); *Floersheim v. FTC*, 411 F. 2d 874 (1969).

In his amended order dissolving the temporary restraining order and denying the preliminary injunction the trial judge concluded that "assuming without deciding that all the allegations of the Complaint are true, the Court will not enter a Preliminary Injunction because it is of the opinion that such conduct does not fall within the purview of G.S. 75-1.1. . . ."

His Honor found however that "there is ample evidence to support a finding that the conduct complained of did occur."

Appellant correctly contends that the court's finding of "ample evidence to support a finding that the conduct complained of did occur" is probable cause for supposing that plaintiff will be able to sustain its allegations at trial. *See Automobile Dealer Resources, Inc. v. Insurance Co.*, 15 N.C. App. 634, 190 S.E. 2d 729 (1972). Since there is ample evidence that the conduct alleged did occur, and the conduct complained of does fall within the scope prohibited by G.S. 75-1.1, it was error for the trial court to dissolve the restraining order and to deny the preliminary injunction. Judgment is vacated and the cause is remanded with directions to enter the preliminary injunction.

Reversed and remanded.

Judge HEDRICK concurs.

Judge PARKER dissents.

STATE OF NORTH CAROLINA v. VON ETTA TERRY AND LATHEN EARL WARREN

No. 7612SC197

(Filed 4 August 1976)

Constitutional Law § 20; Intoxicating Liquor § 8— transportation of alcoholic beverage — distinction between for-hire vehicle and other vehicles — statute constitutional

Since there exists a "reasonable basis" for distinguishing transportation of alcoholic beverages in a for-hire passenger vehicle from other modes of transportation, G.S. 18A-26(a) providing for classification of the modes of transportation does not offend the equal protection clause of either the Federal or State Constitutions.

APPEAL by the State from *Herring, Judge.* Judgment entered 12 February 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 9 June 1976.

The defendants, Von Etta Terry and Lathen Earl Warren, were charged in a magistrate's order, proper in form, issued pursuant to G.S. 15A-511, with "transport[ing] more than the

legal limit of alcoholic beverages in a vehicle, without first obtaining a valid transportation permit from the Cumberland County ABC Board," a violation of G.S. 18A-26(a). From an order entered in the District Court declaring G.S. 18A-26(a) to be unconstitutional, the State appealed. In the Superior Court, defendants moved to dismiss the charge, pursuant to G.S. 15A-954, on the grounds that the statute alleged to have been violated was unconstitutional on its face. After a hearing Judge Herring made findings and conclusions and entered an order allowing defendants' motion. The State appealed to this court.

Attorney General Edmisten by Associate Attorneys James Wallace, Jr., and Jack Cozort for the State.

Lacy S. Hair for defendant appellees.

HEDRICK, Judge.

The facts surrounding defendants' arrest are not in dispute. On 18 October 1975 the defendants, Terry and Warren, each purchased one gallon of taxpaid whiskey at a Cumberland County ABC store. Each defendant was the owner of the one gallon which he purchased. As they were transporting the whiskey home in an automobile owned by Terry and driven by Warren, they were stopped and arrested for violating G.S. 18A-26(a), which in pertinent part provides:

> "*Transportation of alcoholic beverages.*—(a) A person may transport, not for sale or barter, not more than one gallon of alcoholic beverages, except as authorized by permit, to and from any place in the State; . . .
>
> It shall be unlawful for any person operating a for-hire passenger vehicle as defined in G.S. 20-38(20) (b) to transport alcoholic beverages except when the vehicle is actually transporting a bona fide paying passenger who is the actual owner of the alcoholic beverages being transported. Alcoholic beverages owned and possessed by each passenger shall be transported in the manner and amount authorized by this section, . . ."

Judge Herring concluded in his order:

> "1. That there is no reasonable relation to the public peace and welfare or safety in the requirement of provisions of G.S. 8-26 [18A-26] regarding maximum amount

of alcoholic beverages which may be transported as between private vehicles and for-hire passenger vehicles, as defined in G.S. 20-38(20) (b).

2. That the requirement of statute as to persons utilizing private vehicles as opposed to those utilizing for-hire passenger vehicles, is arbitrarily discriminatory and is in violation of the Fourth Amendment [Fourteenth Amendment] to the United States Constitution and Article 1 Section 19 of the North Carolina Constitution, declaring that no person be denied equal protection of the law."

It is apparent from the conclusions of law in the order that Judge Herring interpreted the statute as being discriminatory in allowing persons utilizing for-hire passenger vehicles to transport more alcoholic beverages than persons transporting alcoholic beverages in a privately owned vehicle.

Assuming arguendo that Judge Herring was correct in concluding that the statute in question does permit the transportation of more than one gallon of alcoholic beverage in a motor vehicle for hire under some circumstances without obtaining a permit, still it does not necessarily follow that such discrimination is "arbitrary" or that the discrimination serves "no reasonable relation to the public peace and welfare."

The classification in the present case does not affect any "fundamental interest" of the defendants and is not "inherently suspect," so as to require a "compelling State interest" in order to justify the discrimination on Constitutional grounds. *See In re Walker,* 282 N.C. 28, 191 S.E. 2d 702 (1972), and cases cited therein. Indeed, the U. S. Supreme Court in *California v. LaRue,* 409 U.S. 109, 34 L.Ed. 2d 342 (1972), stated that:

"While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals [in the area of alcoholic beverage regulation]."

If a classification is based on differences reasonably related to the purposes of the legislation in which it is found, then such classification does not offend the equal protection

clause of either the Federal or State Constitutions. *In re Walker, supra.* "[T]he General Assembly may distinguish, select and classify objects of legislation provided such classifications are reasonable and just and apply uniformly to all members of the affected class." *Ramsey v. Veterans Commission,* 261 N.C. 645, 135 S.E. 2d 659 (1964).

There are significant differences present in the transportation of alcoholic beverages owned by passengers traveling in a for-hire passenger vehicle and transportation in private vehicles. The for-hire vehicle, in most instances, must serve anyone who demands a ride and has the money to pay for it. The driver of a for-hire vehicle has no authority to inspect the contents of baggage which the passenger might be carrying to determine if there are possible violations of the State's liquor laws. A person owning or operating a private vehicle has a choice to allow a rider or not and to require him not to bring particular items with him.

The State has a legitimate legislative interest in controlling the sale and transportation of alcoholic beverages.

> " 'In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." ' *Dandridge v. Williams,* 397 U.S. 471, 485, 25 L.Ed. 2d 491, 501-02, 90 S.Ct. 1153, 1161 (1970)." *Glusman v. Trustees* and *Lamb v. Board of Trustees,* 281 N.C. 629, 638, 190 S.E. 2d 213, 219 (1972).

There exists a "reasonable basis" for distinguishing transportation of alcoholic beverages in a for-hire passenger vehicle from other modes of transportation. The statute in the present case is not unconstitutional on its face or as applied to these defendants. The order appealed from is reversed and the cause is remanded to the Superior Court with directions that the Superior Court remand the cause to the District Court for further proceedings as by law provided.

Reversed and remanded.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. RONEY LEE JOHNSON

No. 7610SC87

(Filed 4 August 1976)

1. **Indictment and Warrant § 13— bill of particulars — choice by State between different versions of shooting**

Defendant was not entitled to a bill of particulars by which the State would be required to choose between offering defendant's version of the shooting as contained in his confession and a different version of the shooting by two eyewitnesses since an accused is not entitled to have discrepancies in the State's evidence resolved by a bill of particulars.

2. **Criminal Law §§ 75, 90— confession — no impeachment of State's own witnesses**

The State's offer of defendant's confession which conflicted with testimony of the State's witnesses did not constitute impeachment by the State of its own witnesses; furthermore, defendant was not prejudiced by admission of the confession since it placed before the jury a possible justification for the shooting for which defendant was being tried.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 15 October 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 11 May 1976.

Defendant was charged in a bill of indictment with the murder of Jesse Ronzie Cooper.

The State's evidence, through the State's two eyewitnesses, tended to show that an argument developed between defendant and deceased during, or as the result of, a poker game. Defendant and deceased engaged in a scuffle and fisticuffs. Defendant then went outside to his automobile and removed a pistol from its trunk. As defendant started back towards the building, his brother tried to hold him. Despite his brother's efforts to stop him, defendant fired two shots from the pistol, one of which struck deceased in the heart and fatally wounded him.

The State's evidence, through defendant's confession, tended to show that an argument developed between defendant and deceased as the result of a poker game. Deceased hit defendant with his fist, and defendant drew his pistol from his pocket. Defendant fired twice at deceased's legs. Defendant did not intend to kill deceased.

The jury found defendant guilty of second degree murder.

Attorney General Edmisten, by Associate Attorney Jack Cozort, for the State.

Manning, Fulton & Skinner, by Howard E. Manning, Jr., for the defendant.

BROCK, Chief Judge.

[1] Before trial defendant filed a motion for a bill of particulars, which reads in pertinent part as follows:

> "1. That the defendant cannot adequately prepare or conduct his defense without the following information:
>
> "a. State with particularity the exact circumstances which the State contends constitute the alleged 'malice aforethought' of the defendant.
>
> "b. State with particularity and in detail the exact circumstances and manner in which the State contends the defendant killed the deceased."

In our view the motion requested far more than what a defendant is rightfully entitled to have. An accused is not entitled to an order requiring the State to recite matters of evidence in a bill of particulars. G.S. 15A-925(c). The purpose of a bill of particulars is to give an accused notice of the specific charge or charges against him and to apprise him of the particular transactions which are to be brought in question on the trial. *State v. Conner,* 23 N.C. App. 723, 209 S.E. 2d 531 (1974); *State v. Wadford,* 194 N.C. 336, 139 S.E. 608 (1927).

In the present case the defendant sought to have the State choose between offering defendant's confession wherein he stated that upon being struck a blow by deceased, he drew his pistol and fired; and offering the testimony of the State's eyewitnesses to the effect that after a fight with deceased, defendant obtained a pistol from his automobile and returned to the building, where he shot deceased. Clearly these were discrepancies in the State's evidence, as there generally are, but they were for the jury to resolve. An accused is not entitled to require the State to resolve these discrepancies in advance by a bill of particulars. Nor is an accused entitled to require the State to elect, by a bill of particulars, which witness's version of the events it will present.

The bill of particulars filed by the State in this case reads as follows:

> "On the date alleged in the indictment the defendant took a gun from his car or his pocket. Notwithstanding the discouragement of those around him, he pointed the gun at the decedent and pulled the trigger. The gun discharged and the bullet propelled thereby entered the decedent's heart and fatally wounded him."

The foregoing bill furnished to the defendant all and more than that to which he was entitled, particularly with respect to the first sentence. Defendant was not entitled to have the State specify the precise place from where defendant obtained or produced the pistol with which he shot the deceased. Such specification constitutes a recitation of matters of evidence. Defendant's arguments regarding the insufficiency of the bill of particulars are without merit and are overruled.

[2] Defendant argues that the trial court committed error in permitting the State to offer defendant's confession of the shooting because the confession conflicted with the testimony of the State's witnesses and constituted impeachment by the State of its own witnesses. The State's eyewitness version was that defendant left the building, secured the pistol from the trunk of his car, returned to the building, and fired the fatal shot, notwithstanding the fact that defendant's brother tried to restrain defendant. Defendant's confession presented the version that deceased struck defendant, and defendant drew the pistol from his pocket and fired in self-defense. Obviously this does not constitute impeachment by the State of its own witnesses. It is merely a variation in the versions of how the shooting took place. The discrepency was for the jury to resolve. In any event the offering of defendant's confession was beneficial to defendant because it placed before the jury a possible justification for the shooting. Apparently it had some beneficial effect on the jury because the verdict was second degree murder instead of first degree. We find no merit in this argument.

Defendant argues that the district attorney's remarks to the jury were improper. If so, the trial judge promptly and clearly remonstrated with the district attorney and properly instructed the jury. Defendant's argument is without merit.

Defendant's remaining assignments of error are related to the court's instructions to the jury. We have reviewed these

and find no prejudicial error. Considered as a whole, the instructions fairly present the case to the jury under applicable principles of law. In our opinion defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and CLARK concur.

DEVERE C. LENTZ, JR., ADMINISTRATOR OF THE ESTATE OF THAD CLAYTON ROBERTS, JR. v. ROY B. GARDIN, ADMINISTRATOR OF THE ESTATE OF LORENE LILLARD ROBERTS

No. 7628SC228

(Filed 4 August 1976)

Death § 7— wrongful death — nominal damages — jury instruction improper

The trial court in a wrongul death action erred in instructing the jury that "the plaintiff has introduced evidence of damages which are more than nominal, and if you believe the evidence, in whole or in part, it would be your duty to award . . . more than nominal damages . . ." since plaintiff's evidence was sufficient to support but not compel a verdict for more than nominal damages.

APPEAL by defendant from *Griffin, Judge.* Judgment entered 24 October 1975 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 14 June 1976.

This lawsuit arose out of a one-car accident in which both Mr. and Mrs. Thad Clayton Roberts, Jr., were killed.

In a complaint, filed 3 May 1974, the plaintiff administrator of the estate of Thad Clayton Roberts, Jr., alleged that defendant's intestate Lorene Lillard Roberts, on or about 22 April 1973 negligently " . . . and carelessly drove a motor vehicle off of the traveled portion of said highway, above referred to, and struck a tree with the result that Thad Clayton Roberts, Jr., a passenger in said vehicle, was fatally injured." Based on the foregoing, plaintiff prayed for $100,000 damages.

Defendant administrator's answer admitted that his intestate, Lorene Roberts, was an occupant in the car, denied plaintiff's substantive allegations and counterclaimed that Thad's

death resulted from his own contributory negligence. Specifically, defendant administrator alleged that plaintiff's intestate

> " . . . occupied an automobile being operated by a person whom he knew, or by the exercise of reasonable diligence should have known, to be under the influence of some intoxicating beverage.
>
> b. He failed to remonstrate with the operator of the automobile occupied by him.
>
> c. He failed to quit the journey and to remove himself from the automobile occupied by him when he had opportunity to do so and was aware of the fact that the same was being operated negligently.
>
> d. He encouraged and participated in the operation of the motor vehicle operated by LORENE LILLARD ROBERTS while the operator was under the influence of some intoxicating beverage."

At trial, the following admissions were introduced:

"1. That immediately prior to the accident involved in this lawsuit, which occurred on April 22, 1973, at approximately 5:30 p.m., on North Carolina Highway # 16, Lorene Lillard Roberts was driving her 1971 Rambler in a northerly direction.

2. That at approximately 5:30 p.m. on said date, said Lorene Lillard Roberts drove her vehicle across the center line of said road, went through a fence, and struck a tree on the westerly side of said highway.

3. That Thad Clayton Roberts, Jr., a passenger in said vehicle, died as a result of injuries received in said accident at approximately 6:30 p.m. on April 22, 1973.

4. That Lorene Lillard Roberts died as a result of the injuries received in said accident at approximately 5:30 p.m. on April 22, 1973.

5. That the 1971 Rambler vehicle involved in the accident in which Thad Clayton Roberts, Jr. was riding, was owned by and registered in the name of Lorene Lillard Roberts on April 22, 1973.

6. That Lorene Lillard Roberts failed to negotiate the right-hand curve, crossed the center line of said highway, and then her vehicle left the highway above referred to.

7. That on April 22, 1973, the 1971 Rambler automobile owned and operated by Lorene Lillard Roberts was in good mechanical condition and free of defects.

8. That North Carolina Highway #16 in Wilkes County, North Carolina, on which road said Lorene Lillard Roberts was traveling when said accident occurred, was dry and free of defects in the area where the said Lorene Lillard Roberts' vehicle veered from said highway."

The plaintiff's evidence included two eyewitnesses who testified that decedent's car was approaching the car in which they were riding; that when it was "several hundred feet away," it was swerving back and forth across the center line; that "it kept doing this" and it seemed to become more pronounced as it got nearer; that finally "as it got right at us, it swerved in front of us, went diagonally in front of us and ran off the road," and hit a tree.

Thad Roberts, Jr.'s surviving son and daughter also testified, indicating that they had enjoyed a close relationship with their father and stated that he had been in good health at the time of his death at the age of 53. The daughter testified that her father had provided her considerable financial assistance in view of her divorced status and the financial burden of supporting four children.

Defendant's evidence tended to show that on the day in question the decedents consumed some alcoholic beverages. However, witnesses who had seen the decedents that day testified that neither Mr. Roberts nor Mrs. Roberts appeared to be intoxicated, and there was testimony that Mrs. Roberts was a good driver.

From verdict and judgment for plaintiff for $100,000, defendant appealed.

Other facts necessary for decision are set out below.

Lentz & Ball, P.A., by Ervin L. Ball, Jr., for plaintiff appellee.

Morris, Golding, Blue and Phillips, by William C. Morris, Jr., and James N. Golding, for defendant appellant.

MORRIS, Judge.

Defendant contends that the trial court expressed an opinion on the evidence relating to damages, thus violating G.S. 1A-1, Rule 51. We agree.

In *Bowen v. Rental Co.*, 283 N.C. 395, 418, 196 S.E. 2d 789 (1973), former Chief Justice Bobbitt noted that under G.S. 28-174(a)(6), "[n]ominal damages and costs may now be recovered *if the jury finds* that the decedent's death was caused by the defendant's wrongful act but fails to find that such death caused pecuniary loss." (Emphasis supplied.) Here, the trial court instructed the jury: "[t]he plaintiff has introduced evidence of damages which are more than nominal, and if you believe the evidence, in whole or in part, it would be your duty to award . . . more than nominal damages. . . ." While it is true that plaintiff's evidence could be said to be sufficient to support a verdict for more than nominal damages, it is not sufficient to *compel* such a verdict. The instruction precluded the jury's consideration of nominal damages, and constituted prejudicial error entitling defendant to a new trial on the issue of damages.

Defendant argues that the trial court gave an incomplete instruction with respect to the doctrine of *res ipsa loquitur*. He does not contend that the doctrine is inapplicable to the facts of this case. While we question the propriety of instructing on the doctrine in this case, we are of the opinion that the court's instructions were adequate and did not, as defendant contends, leave the jury with the erroneous impression that the circumstantial evidence of driver negligence furnished by the doctrine of *res ipsa loquitur* compelled a finding of actionable negligence.

We have reviewed defendant's other assignments of error and find them to be without merit. Defendant is entitled to a new trial on the issue of damages only.

New trial on issue of damages.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. JOHN A. SPRINKLE

No. 7623SC217

(Filed 4 August 1976)

Homicide § 28— self-defense — burden of proof — jury instructions proper

Instructions of the trial court in a prosecution for voluntary manslaughter sufficiently apprized the jury that the burden of proof with respect to self-defense rested with the State.

Judge CLARK dissenting.

APPEAL by defendant from *McConnell, Judge.* Judgment entered 27 October 1975 in Superior Court, ALLEGHANY County. Heard in the Court of Appeals 11 June 1976.

Defendant was indicted for voluntary manslaughter. From a plea of not guilty, the jury returned a verdict of guilty as charged. From judgment sentencing him to a term of imprisonment, defendant appealed.

Other facts necessary for decision are set out below.

Attorney General Edmisten, by Special Deputy Attorney General John Silverstein and Associate Attorney Noel Lee Allen, for the State.

Arnold L. Young and Franklin D. Smith for defendant appellant.

MORRIS, Judge.

Defendant, contending that he acted in self-defense, maintains that the trial court erred by failing to charge the jury correctly and sufficiently that the burden of proof with respect to self-defense rests with the State, in violation of the principles enunciated in *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975); *State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575 (1975). We disagree.

It is true that the court did not, as defendant indicates it should have, say specifically that the jury could not find defendant guilty of voluntary manslaughter unless the State had proved that defendant did not act in self-defense. Nevertheless, the court did clearly instruct the jury that it was the burden of the State to satisfy them of defendant's guilt beyond a reasonable doubt. They were further instructed that defend-

ant would not be guilty if they were satisfied that defendant acted in self-defense; that it appeared to him that it was necessary to shoot deceased in order to save himself from death or great bodily harm, that the circumstances as they appeared to defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; that the defendant was not the aggressor; that he did not use excessive force.

The court then recapitulated the evidence, including the evidence of self-defense and stated that the defendant contended that the jury should be satisfied from the evidence that he acted in self-defense but that "it is not his burden to prove his innocence. The burden never shifts to the defendant, but if you are satisfied he acted in self-defense you will find him not guilty." Though the charge could have complied more precisely, we think that it is in substantial compliance with *Mullaney* and *Hankerson* and that the jury could not have understood that the defendant had the burden of proving his innocence upon the ground of self-defense. We note that the opinion in *Hankerson* was filed 17 December 1975. The judgment in this case was entered on 27 October 1975. The court did not have the benefit of that opinion's interpretation of the application of *Mullaney* to this case. Since the charge, in our opinion, was sufficient to apprise the jury that the defendant did not have the burden of proving his innocence on the grounds of self-defense, we are constrained to hold that it does not constitute reversible error.

Defendant further contends that the court committed reversible error in very briefly referring to and defining first and second degree murder in reaching voluntary manslaughter. There is no merit in this contention.

No error.

Judge VAUGHN concurs.

Judge CLARK dissents.

Judge CLARK dissenting.

This case was tried after the *Mullaney* decision of 9 June 1975, and before the *State v. Hankerson* decision of 27 October 1975. In *Hankerson* the North Carolina Supreme Court stated: "If upon considering all the evidence, including the inferences

and evidence of self-defense, the jury is left with a reasonable doubt as to the existence of unlawfulness it must find the defendant not guilty."

The trial judge instructed the jury that to excuse the killing the jury must be satisfied that defendant acted in self-defense, both originally in explaining the law of self-defense and in the final mandates.

It is my opinion that the instruction does not comply with the law in *Mullaney* and *Hankerson,* which requires that where defendant raises the issue of self-defense the State must prove beyond a reasonable doubt that he did not act in self-defense. In my opinion the judgment should be reversed for this error.

PHIL MECHANIC CONSTRUCTION CO. v. JOHN B. GIBSON AND WIFE, URSULA GIBSON

No. 7628DC227

(Filed 4 August 1976)

1. **Contracts § 27— summary judgment — principal amount — finance charge — counsel fees**

The trial court in a contract action properly entered summary judgment for the plaintiff in the principal amount of $2,215.00 where defendants admitted that they executed a contract containing a "Cash Price" of such amount, but the court erred in granting plaintiff summary judgment for a finance charge and counsel fees allegedly provided for in the contract where defendants denied that contract provisions for finance charges and counsel fees were filled in when they signed the contract and defendants attached to their answer a contract in which such provisions were left blank.

2. **Pleadings § 11— action on debt — counterclaim under Truth in Lending Act**

A claim for penalties for failure of a creditor to disclose the finance charge as required by the Federal Truth in Lending Act, 15 U.S.C. § 1638(a), may not be raised as a counterclaim in the creditor's action for the unpaid balance on the debt.

APPEAL by defendants from *Allen, Judge.* Judgment entered 23 February 1976, District Court, BUNCOMBE County. Heard in the Court of Appeals 11 June 1976.

In its complaint, plaintiff alleges that it entered into a written contract, attached to the complaint and designated "Ex-

hibit A," to sell and install on their house steel siding for the sum of $3,196.20, that it had performed the contract, but that defendants had failed to pay the contract price.

The contract, "Exhibit A," contained a "box," headed "Statement of Transaction," providing that the contract price of $3,196.20 included a finance charge of $981.20, computed at an annual interest rate of 14.95%, and that if purchasers defaulted they would be liable for reasonable attorneys' fees.

In their answer defendants first admitted the execution of the contract, "Exhibit A," then in their further answer alleged that "Exhibit A" was not a true copy of the contract they executed because when they signed it the box headed "Statement of Transaction" was left blank, except for the space marked "Cash Price" which was filled in with the figure $2,215.00," and defendants attached to this answer a contract designated "Exhibit B," with the box blank as alleged in their answer. Defendants prayed that they recover twice the amount of the finance charge for failure of plaintiff to disclose the amount and rate of the finance charge as required by the Truth in Lending Act.

In their answer to Interrogatories and Request for Admissions the defendants again denied the execution of the contract designated "Exhibit A," and admitted that they executed (1) a certificate acknowledging satisfactory completion of the work and (2) a "Right to Rescind Receipt," which provided that they had the right to cancel the contract within three days from the date on which all disclosures under the Truth in Lending Act were given.

Plaintiff moved for summary judgment, and the court entered judgment for plaintiff for $2,215.00, plus interest of $551.90 computed at the contract rate, and attorneys' fees of $415.04. Defendants appealed.

Gray, Kimel & Connolly by David G. Gray, Jr., for plaintiff appellee.

John I. Jay for defendant appellants.

CLARK, Judge.

[1] Defendants admitted the execution of the contract as alleged by plaintiff, but in their further answer alleged that the

box headed "Statement of Transaction," which included interest and attorney fee provisions was left blank. Construing the defendants' answer with liberality, we find that defendants admit that they executed the written contract attached to their answer and designated "Exhibit B," which left blank the box designated "Statement of Transaction," except for the blank following "Cash Price" which was filled in with the figure "$2,215.00."

Unquestionably, summary judgment against the defendants and for the plaintiff in the principal amount of $2,215.00 was proper. However, since defendants denied in their answer that the contract provision relating to finance charges and attorneys' fees was filled in when they executed the contract, the pleadings raised genuine issues of material fact, and summary judgment under G.S. 1A-1, Rule 56(c) on these two issues should not have been rendered. There was nothing offered by plaintiff to show that it gave the defendants the notice of their obligation to pay attorney fees as required by G.S. 6-21.2(5).

[2] The trial court properly refused to consider defendants' counterclaim for failure of the plaintiff to disclose the finance charge required by the Truth in Lending Act, 15 U.S.C. § 1638(a). In *Enterprises, Inc. v. Neal,* 29 N.C. App. 78, 223 S.E. 2d 831 (1976), this Court held that a claim for penalties under 15 U.S.C. § 1640(a) may not be raised as a counterclaim in the creditor's action for the unpaid balance on the debt.

Affirmed in part and reversed in part and the cause is remanded.

Judges MORRIS and VAUGHN concur.

LAMAR GUDGER, INDIVIDUALLY, AND LAMAR GUDGER, AS THE SOLE SURVIVING PARTNER OF GUDGER & SAWYER, A PARTNERSHIP v. TRANSITIONAL FURNITURE, INC., AND HENRY JAMES, JR.

Nos. 7628SC49 and 7628SC504

(Filed 4 August 1976)

Contracts § 32— contract for legal fees — wrongful interference with performance — summary judgment proper

In an action against individual defendant for his allegedly wrongful interference with the corporate defendant's performance of its

contract to pay plaintiff for legal services, allegations made upon information and belief contained in plaintiff's complaint which were not supported in any way at a hearing on individual defendant's motion for summary judgment were insufficient to overcome the competent evidence offered by defendant showing that he did not interfere with the contract between plaintiff and the corporate defendant.

APPEAL by plaintiff from *Martin (Harry C.), Judge.* Judgment entered 24 May 1976 in Superior Court, BUNCOMBE County.

Plaintiff instituted this action to recover legal fees allegedly owed plaintiff by Transitional Furniture, Inc. Recovery was sought against defendant James on the theory that James wrongfully interfered with Transitional's performance of its contract to pay plaintiff.

The trial judge granted defendant James' motion for summary judgment and dismissed the action as to James, finding that there was no just reason for delay. Plaintiff appealed.

Adams, Hendon & Carson, by George Ward Hendon, for the plaintiff.

James, Williams, McElroy & Diehl, by James H. Abrams, Jr., for defendant James.

BROCK, Chief Judge.

Until January 1975 plaintiff's law firm represented Transitional Furniture, Inc. and its president, Murl Whitener, in several matters involving litigation. In January 1975, at plaintiff's suggestion, Transitional discharged plaintiff and employed defendant James to handle its legal affairs. Defendant James effected a settlement of a fire insurance claim by Transitional. Transitional is alleged to be insolvent.

Defendant offered affidavits in support of his motion for summary judgment. The affidavit of Murl E. Whitener, chief executive officer of Transitional, states: that defendant James effected a settlement of Transitional's fire insurance claim for $100,000.00; that "I instructed Mr. James to effect a proportionate settlement with the creditors of Transitional, but instructed him not to pay Mr. Gudger any amount, as that is what his firm's services were reasonably worth"; that "I did authorize Mr. James to make some provision for paying Mr. Gudger's expense statement of $1,112.88, but only after some

persuasion from Mr. James." The affidavit of defendant James states: "At all times since January of 1975 I have been an attorney in an attorney-client relationship with Transitional; at no time have I nor any attorney employed by James, Williams, McElroy & Diehl, P.A. promised to pay or see to payment of plaintiffs' alleged fee; at no time have I been authorized by Transitional to pay plaintiffs' alleged fee; I was specifically instructed by Transitional not to pay plaintiffs' alleged fee, as Transitional considers it not due and owing; I have no assets of Transitional under my control."

In opposition to defendant James' motion for summary judgment, plaintiff offered his own affidavit. Plaintiff's affidavit purports to support his claim against Transitional, but in no way does it purport to support his claim against defendant James. Plaintiff offered no evidence to support his claim against defendant James.

The purpose of the summary judgment rule is to provide an expeditious method of determining whether a genuine issue as to any material fact actually exists and, if not, whether the moving party is entitled to judgment as a matter of law. *Rentals, Inc. v. Rentals, Inc.*, 26 N.C. App. 175, 215 S E. 2d 398 (1975). Unsupported allegations in the pleadings are insufficient to create a genuine issue as to a material fact where the moving adverse party supports his motion by competent evidentiary matter showing the facts to be contrary to that alleged in the pleadings. *Blackmon v. Decorating Co.*, 11 N.C. App. 137, 180 S.E. 2d 396 (1971). "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." G.S. 1A-1, Rule 56(e).

The only claim asserted by plaintiff against defendant James is by way of allegations on information and belief contained in the complaint. These allegations were not supported in any way at the summary judgment hearing. Standing alone, they are insufficient to overcome the competent evidence offered by the movant showing the facts to be contrary to those alleged.

Summary judgment was properly entered for the defendant James.

Affirmed.

Judges HEDRICK and CLARK concur.

MARGIE ECKLIN MOORE, WIDOW OF K. E. MOORE v. WACHOVIA BANK AND TRUST COMPANY, TRUSTEE UNDER THE WILL OF K. E. MOORE, DECEASED; OPAL M. NANNEY; AND LISA RAKOWSKI, KEITH RAKOWSKI, AND LORRIE RAKOWSKI, MINORS, BY THEIR GUARDIAN AD LITEM, FRANKLIN B. JOHNSTON

No. 762SC96

(Filed 4 August 1976)

Fraud § 9— wife's conveyance to husband — insufficient allegations of fraud

Plaintiff's allegations that she conveyed her interest in entirety property to her husband because her husband falsely told her that he could not make a will unless her name was taken off the deed were insufficient to state a claim for setting aside her deed to her husband on the ground of active or constructive fraud.

APPEAL by plaintiff from *Rouse, Judge.* Judgment entered 24 November 1975 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 12 May 1976.

By deed dated 17 March 1959 plaintiff Margie Moore, wife of K. E. Moore, conveyed her interest in approximately 500 acres of land owned jointly by her and her husband to her husband, K. E. Moore. The deed was properly acknowledged pursuant to G.S. 52-6. Plaintiff and her husband have been married since 1930. K. E. Moore died on 30 May 1969. Four years after his death on 5 October 1973, plaintiff instituted this action to set aside the 1959 deed on the grounds that it was fraudulently procured by her husband. In paragraph 6 of the complaint the following allegations appear:

"6. That the fraud complained of is that K. E. Moore in violation of the mutual trust he and plaintiff had exercised towards one another for nearly 40 years fraudulently and falsely stated to the plaintiff that he could not make a will unless her name was taken off the deed. That the plain-

tiff believed the representations of the said K. E. Moore and acceeded to his procurement of her signature on the said deed."

The defendant, Wachovia Bank and Trust Company, moved for judgment on the pleadings. The motion was granted, and judgment dismissing the action was entered on 24 November 1974.

Plaintiff appealed.

Frazier T. Woolard for the plaintiff.

Gaylord, Singleton & McNally, by Danny D. McNally, and Mayo & Mayo, by William P. Mayo, for the defendant, Wachovia Bank and Trust Company.

BROCK, Chief Judge.

The sole question upon review is whether plaintiff's allegation that her husband asked her to convey her interest in the land so that he could "make out a will," coupled with allegations that his statement was "false and fraudulent" and induced plaintiff to execute the deed, is a sufficient allegation of either active or constructive fraud. In our opinion plaintiff's complaint is deficient, and defendant's motion for judgment on the pleadings was properly granted.

The essential elements of active fraud are well-established: There must be a misrepresentation of material fact, made with knowledge of its falsity and with intent to deceive, which the other party reasonably relies on to his deception and detriment. *Ragsdale v. Kennedy,* 286 N.C. 130, 209 S.E. 2d 494 (1974); *Auto Supply Co., Inc. v. Equipment Co., Inc.,* 2 N.C. App. 531, 163 S.E. 2d 510 (1968). Equally well-established is the requirement that the plaintiff allege all material facts and circumstances constituting the fraud with particularity in the complaint. *See* G.S. 1A-1, Rule 9(b). Mere generalities and conclusory allegations of fraud will not suffice. *In re Estate of Loftin* and *Loftin v. Loftin,* 285 N.C. 717, 208 S.E. 2d 670 (1974).

At most, plaintiff's complaint alleges that her husband asked her to deed her interest in the land to him so that he could make out a will and that she acquiesced. Only by speculation can actionable fraud be deduced from plaintiff's allegations. "A plead-

ing setting up fraud must allege the facts relied upon to constitute fraud, and that the alleged false representation was made with intent to deceive plaintiff, or must allege facts from which such intent can be legitimately inferred." *Calloway v. Wyatt*, 246 N.C. 129, 97 S.E. 2d 881 (1957). In our opinion plaintiff's complaint fails to meet this standard.

As noted in *Miller v. Bank*, 234 N.C. 309, 67 S.E. 2d 362 (1951), "[c]onstructive fraud differs from active fraud in that the intent to deceive is not an essential element, but it is nevertheless fraud though it rests upon presumption arising from breach of fiduciary obligation rather than deception intentionally practiced." "Where a transferee of property stands in a confidential or fiduciary relationship to the transferor, it is the duty of the transferee to exercise the utmost good faith in the transaction and to disclose to the transferor all material facts relating thereto and his failure to do so constitutes fraud. . . . Any transaction between persons so situated is 'watched with extreme jealousy and solicitude; and if there is found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party.' " *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971).

Although plaintiff and K. E. Moore shared a fiduciary relationship as husband and wife at the time she executed the 1959 deed, there is no indication that he failed to exercise the utmost good faith in the transaction. He asked for her interest in the property so that he could "make out a will," and she generously conveyed her interest to him pursuant to his request. It appears that she understood the legal import of her actions and that she unequivocally intended to convey her interest in the land to him at the time she executed the deed. In the absence of a showing of fraudulent concealment or other form of misconduct resulting in injury to the plaintiff, the mere conveyance of a valuable interest in land by one spouse to the other spouse without consideration will not give rise to an action for constructive fraud. Here, K. E. Moore's request that his wife convey her interest in the property to him so that he could "make out a will," standing by itself, is not sufficient evidence of constructive fraud. Plaintiff's allegations are simply too sparce and fail to disclose in a convincing manner that she was deceived or taken advantage of by her husband at the time she executed the 1959 deed.

Affirmed.

Judges BRITT and ARNOLD concur.

RUSSELL DEAN FOWLER v. PAUL McLEAN

No. 7519SC1078

(Filed 4 August 1976)

Compromise and Settlement § 3; Torts § 7— plea of release — ratification — later withdrawal of plea — effect

In an action arising out of an automobile accident, plaintiff's plea of a release obtained by his insurance carrier as a bar to defendant's counterclaim in a former action between the parties in which plaintiff took a voluntary dismissal, although now withdrawn by plaintiff, constituted a ratification of the release and barred plaintiff's present action against defendant.

APPEAL by plaintiff from *Gavin, Judge.* Judgment entered 9 October 1975 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 15 April 1976.

Plaintiff instituted an action in Randolph County against defendant seeking damages allegedly suffered in an automobile accident on 4 October 1974 (Randolph County No. 74CVS1511). In that action defendant filed a counterclaim seeking damages that he allegedly suffered in the accident. The above case was called for trial on 16 June 1975. During the course of selecting a jury, it was brought to the attention of plaintiff that plaintiff's liability insurance carrier had settled defendant's claim for damages and that defendant had executed a release. Plaintiff moved that defendant's counterclaim be dismissed as a matter of law on the grounds of the execution of the release, and offered the release in evidence in support of the motion. After argument on the motion to dismiss the counterclaim but before the trial judge ruled on the motion, plaintiff took a voluntary dismissal of his action against defendant. Trial of defendant's counterclaim was continued in the trial judge's discretion.

On 13 August 1975 plaintiff filed complaint in the present action (Randolph County No. 75CVS510). The complaint alleges negligence of defendant resulting in the same accident involved

in the former action. Defendant denied negligence and damages, pleaded contributory negligence, and asserted that plaintiff's plea in the former action of the defendant's release barred plaintiff's right to maintain an action against defendant.

On 17 September 1975 an order was entered consolidating the pending counterclaim from the former action (No. 74CVS1511) with the present action (No. 75CVS510) for trial and setting it as the first case for trial at the 6 October 1975 session.

When the case was called for trial on 6 October 1975, plaintiff withdrew his motion to dismiss defendant's counterclaim in the former action (No. 74CVS1511). Defendant pursued his motion to dismiss plaintiff's present action (No. 75CVS510) on the grounds that plaintiff's plea of the release as a bar to defendant's counterclaim in the former action (No. 74CVS1511), although now withdrawn by plaintiff, constitutes a bar to plaintiff's present action against defendant.

The trial judge allowed defendant's motion, dismissed plaintiff's action with prejudice (No. 75CVS510), and continued the trial of the counterclaim in the former action (No. 74CVS1511).

Plaintiff appealed.

Ottway Burton, by Millicent Gibson, for the plaintiff.

Henson, Donahue & Elrod, by Daniel W. Donahue, for the defendant.

BROCK, Chief Judge.

" '[W]here an insurance carrier makes a settlement in good faith, such settlement is binding on the insured as between him and the insurer, but . . . such settlement is not binding as between the insured and a third party where the settlement was made without the knowledge or consent of the insured or over his protest, unless the insured in the meantime has ratified such settlement.' (Citation omitted.) Such consent or ratification constitutes an admission of his liability by the insured. (Citation omitted.)" *McKinney v. Morrow,* 18 N.C. App. 282, 196 S.E. 2d 585 (1973), *cert. den.* 283 N.C. 665, 197 S.E. 2d 874 (1973).

Plaintiff contends that his withdrawal of his plea of the release as a bar to defendant's counterclaim placed the case

back in a posture as though no such plea had been made. This argument has been answered as follows:

> "This leaves us with the proposition of whether the withdrawal by the plaintiff of the 'further reply' constituted a revocation of the ratification. The answer is no. In *Norwood v. Lassiter,* 132 N.C. 52, 43 S.E. 509, it is said: 'When a party has the right to ratify or reject, he is put thereby to his election, and he must decide, once and for all, what he will do, and when his election is once made it immediately becomes irrevocable. This is an elementary principle. *Austin v. Stewart,* 126 N.C. 525.' See also Breckenridge, 'Ratification in North Carolina', 18 N.C. L. Rev. 308. Although the 'further reply' had been withdrawn as a pleading, it was proper for Judge Bundy to consider it in making his findings of fact and conclusions of law. *Davis v. Morgan,* 228 N.C. 78, 44 S.E. 2d 593 (1947)." *White v. Perry,* 7 N.C. App. 36, 171 S.E. 2d 56 (1969).

The case of *Bongardt v. Frink,* 265 N.C. 130, 143 S.E. 2d 286 (1965), is readily distinguishable from the case *sub judice.* In that case, after the court permitted the plaintiff to withdraw the reply pleading the release, the defendant did not amend its answer to allege the filing of the reply as a plea in bar. In the present case the defendant did answer with a specific plea of plaintiff's ratification of the release as a bar to plaintiff's action.

Affirmed.

Judges HEDRICK and CLARK concur.

REDEVELOPMENT COMMISSION OF THE CITY OF DURHAM v. MARGARET G. HOLMAN (WIDOW); MADGE T. HARGRAVES (WIDOW); CITY OF DURHAM; AND COUNTY OF DURHAM

No. 7514SC942

(Filed 4 August 1976)

1. Rules of Civil Procedure § 59— reduction in verdict — agreement by successful party

Though the judgment should generally follow the verdict, the court has the power to reduce the verdict of its own motion so long as the party in whose favor it was rendered does not object.

2. **Eminent Domain § 14; Rules of Civil Procedure § 59— condemnation proceeding — verdict reduced by trial court — no error**

In a condemnation proceeding where the jury awarded respondents $59,471 but the respondents agreed to a remittitur to $58,000 and judgment was entered for that amount, the judgment was supported by competent evidence and was in accordance with the amount a reasonable jury might award; there was no abuse of discretion on the part of the judge; and the court was correct in allowing respondents' motion for a remittitur and refusing petitioner's motion for a new trial.

APPEAL by Redevelopment Commission of the City of Durham from *Braswell, Judge.* Judgment entered 10 July 1975. Heard in the Court of Appeals 10 March 1976.

This is a condemnation proceeding whereby petitioner, Redevelopment Commission of the City of Durham, seeks to acquire land of respondents, Margaret G. Holman and Madge T. Hargraves, in order that petitioner can carry out the Redevelopment Plan for an area of Durham. Petitioner filed the condemnation petition to condemn land located at 408 and 410 Fowler Avenue and 405 and 407 Piedmont Avenue in the City of Durham on 11 July 1974 and respondents answered, requesting they be awarded the fair market value of the property. At the pre-trial conference on 3 June 1975 the parties stipulated that the contested issue to be tried by the jury was the amount of the fair market value of the property on 11 July 1974, the date of the "taking" of respondents' property.

At the trial, respondents presented competent evidence showing the fair market value of the property to be $58,000.00. Petitioner offered evidence that the fair market value as of 11 July 1974 was $30,560.00. Petitioner's witness further testified that the total replacement cost of the four dwellings as of 11 July totalled $59,471.00 before discounting for depreciation. More specifically, the witness stated that the cost of replacing the four houses on the respective lots would total $59,471.00, and with depreciation factor, would indicate a value for the property of $31,250.00.

The jury awarded respondents $59,471.00. The judge found that there was no evidence to support the jury's verdict and that he would set the verdict aside unless respondents agreed to a remittitur to $58,000.00. Respondents so agreed, petitioner's motion to set the verdict aside and have a new trial was denied,

and judgment was entered for respondents in the amount of $58,000.00. Petitioner appealed.

Edwards and Manson, by Daniel K. Edwards, for petitioner.

Eugene C. Brooks III and Richard N. Watson, for respondents.

MARTIN, Judge.

Petitioner contends that the trial court erred in allowing respondents' motion for a remittitur and refusing to grant the petitioner's motion for a new trial.

[1] While it is generally stated that the judgment should follow the verdict, *Bethea v. Kenly,* 261 N.C. 730, 136 S.E. 2d 38 (1964), the court has the power to reduce the verdict of its own motion so long as the party in whose favor it was rendered does not object. *Cohoon v. Cooper,* 186 N.C. 26, 118 S.E. 834 (1923). See *Caudle v. Swanson,* 248 N.C. 249, 103 S.E. 2d 357 (1958). This practice of remittitur with the successful party's consent, as in the case here, has been followed for many years by the courts in this State, and under G.S. 1A-1, Rule 59, the practice is still permissible in our courts. 2 McIntosh, North Carolina Practice and Procedure 2d (Phillip's Supp. § 1596, p. 58). See 11 Wright and Miller, Federal Practice and Procedure, § 2815, pp. 99-100. Concerning contentions that this practice denies petitioner his constitutional right to a trial by jury, it would appear that such procedure does not so deprive him, "because he will pay less under such procedure than the amount which a jury awarded by its verdict against him, and he will pay no more than a reasonable jury might award against him." *Caudle v. Swanson, supra,* at 256, 103 S.E. 2d at 362.

[2] As to the argument that the verdict in the amount of $59,471.00 exceeded a sum supported by competent evidence, we note that while the verdict in the instant case exceeded competent evidence, the judgment is based on competent evidence. The voluntary reduction of respondents' recoveries as established by the judgment was not prejudicial to petitioner. Further, in *Harvey v. R. R.,* 153 N.C. 567, 69 S.E. 627 (1910), the majority stated that when a jury's verdict exceeds the evidence, the decision to grant a new trial is in the discretion of the trial judge, and the appellate court will review the trial judge only if it appears he grossly abused his discretion. Here there is nothing to indicate that the judge abused his discretion.

We conclude that in this particular case, where the judgment was supported by competent evidence and was in accordance with the amount a reasonable jury might award, and there was no abuse of discretion on the part of the judge, the court was correct in allowing respondents' motion for a remittitur and refusing petitioner's motion for a new trial. Therefore, the judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. LEX MILTON CULP

No. 7619SC247

(Filed 4 August 1976)

1. **Criminal Law §§ 97, 122— jury request to rehear evidence — denial proper**

The trial court did not abuse its discretion in denying the jury foreman's request that the court reporter read back all of the evidence.

2. **Criminal Law § 142— suspended sentence — banishment as condition — error**

A sentence of two years on the roads suspended on condition that defendant remove his trailer from its location and move it to some other location in the county is, in practical effect, a sentence of banishment for two years, and such condition is therefore void.

APPEAL by defendant from *Kivett, Judge.* Judgment entered 18 December 1975 in Superior Court, CABARRUS County. Heard in the Court of Appeals 16 June 1976.

Defendant was indicted for feloniously discharging a firearm into a then occupied motor vehicle. From a plea of not guilty, the jury returned a verdict of guilty as charged. The defendant was then sentenced to an active six months term of imprisonment and an additional two-year suspended sentence and placed on probation subject to compliance with certain conditions including a requirement that defendant "[r]emove his trailer from its location and move it to some other location in the County." Furthermore, defendant was to "[a]void any contact and any conversation with the [prosecuting] witness Mr. Robert Smith." From the judgment, defendant appealed.

Other facts necessary for decision are set out below.

Attorney General Edmisten, by Assistant Attorney General Claude W. Harris, for the State.

James C. Johnson, Jr., for defendant appellant.

MORRIS, Judge.

[1] Defendant contends that the trial court erred in denying the jury foreman's request that the court reporter read back all of the evidence. This assignment of error has no merit. We said in *State v. Hatch,* 21 N.C. App. 148, 149, 203 S.E. 2d 334 (1974), cert. denied 285 N.C. 375 (1975), that " . . . it is discretionary with the court to grant or refuse the jury's request for a restatement of the evidence." Here there is neither abuse of discretion nor misapprehension of the law by the trial court.

[2] Defendant also contends that the trial court erred in requiring as a "Special Condition" for probation that defendant move his trailer. More specifically, defendant maintains that such a special condition was tantamount to banishment. We agree.

There is no question but that a court having jurisdiction over criminal cases has the power to suspend judgment on a defendant for some special purpose or for some reasonable time. This power is extensively used by trial judges, and its use has been generally upheld by appellate courts as sound public policy and as being favorable to the defendant as an indication of the court's desire to show mercy and to give the defendant an opportunity to avoid penal confinement and live within the bounds of normal society. However, " . . . [i]n North Carolina a court has no power to pass a sentence of banishment; and if it does so, the sentence is void." *State v. Doughtie,* 237 N.C. 368, 369, 74 S.E. 2d 922 (1953).

The concept of banishment has been broadly defined to include orders compelling individuals " . . . to quit a city, *place,* or country, for a specific period of time, or for life." 8 C.J.S., Banishment, p. 593. (Emphasis supplied.) Here, the "place" from which defendant was told to leave was the situs of his trailer home. Insofar as this probation order require such a move, it is void. As one California Court has stated, "[i]t has been long the law of this state that a judgment of banishment either from the state or *from one part of the state* is void as

against public policy." Application of Newbern, 168 Cal. App. 2d 472, 335 P. 2d 948, 951 (1959). (Emphasis supplied.) Also see: Ex Parte Scarborough, 76 Cal. App. 2d 648, 173 P. 2d 825 (1946); *Burnstein v. Jennings,* 231 Iowa 1280, 4 N.W. 2d 428 (1942); Ex Parte Sheehan, 100 Montana 244, 49 P. 2d 438 (1935); *People v. Smith,* 252 Michigan 4, 232 N.W. 397 (1930).

Though the Michigan Supreme Court does not specifically cite banishment as its authority, its decision in *People v. Smith, supra,* is nonetheless supportive of our holding. In that case, the defendants, charged with disturbing the peace, were placed on probation and ordered, as a condition thereof, to move out of their neighborhood. The Michigan Supreme Court rejected such a condition, considering it to be " . . . without authority of law." *People v. Smith, supra,* at 397.

Here, a sentence of two years on the roads suspended on condition that defendant remove his trailer from its location and move it to some other location in the county is, in practical effect, a sentence of banishment for two years. Defendant and his wife own the land upon which the trailer is located, and one of the conditions of suspension was that defendant avoid any contact with the prosecuting witness. The special condition requiring defendant to move his trailer was beyond the power of the court to inflict and is void, and the case must be remanded for a proper sentence.

We have considered defendant's other assignments of error and find them to be without merit.

Remanded for a proper sentence.

Judges VAUGHN and CLARK concur.

In re Appeal of Matthews

IN THE MATTER OF: THE APPEAL OF JOHN M. MATTHEWS, WINSTON-SALEM, NORTH CAROLINA, FROM AN ACTION OF THE PROPERTY TAX COMMISSION SITTING AS THE STATE BOARD OF EQUALIZATION AND REVIEW

No. 7621SC225

(Filed 4 August 1976)

Taxation § 25— property subject to discovery — failure to list — time of acquisition

The Property Tax Commission properly determined that certain carpets, blinds and appliances owned by petitioner and placed in his apartment complex were subject to discovery and were properly appraised and assessed for taxation where the Commission found that the property in question was acquired after January 1969 (subsequent to the 1968 reappraisal of the apartments in which it was located) and that the property had never been listed for taxation either as acquisitions of personal property or improvements to real estate.

APPEAL by petitioner from *Seay, Judge.* Judgment entered 13 November 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 11 June 1976.

In the judgment from which petitioner appealed the court affirmed a decision of the Property Tax Commission, sitting as the State Board of Equalization and Review. In essence, the county contended that petitioner had failed to list certain carpets, blinds and appliances owned by him and placed in his apartment complex. Acting under the "Discovery" statutes the county proceeded to list, appraise and assess the property for taxation. The Commission determined that the property was subject to discovery and was properly assessed by the county in the following amounts.

	"APPRAISED VALUE	ASSESSED VALUE
1970	$18,165	$10,540
1971	16,464	9,550
1972	15,202	8,820
1973	23,822	13,820"

In apt time, petitioner sought judicial review of that decision. The court reviewed the record made before the Commission, the briefs and argument of the parties and concluded (1) that the findings of fact by the Commission were supported by the evidence, and (2) that the conclusions of law

were in accord with applicable law. The final decision of the Commission was affirmed.

Petitioner appealed.

Philip B. Whiting and T. Paul Hendrick, for petitioner appellant.

P. Eugene Price, Jr., and Richard L. Goard, for respondent appellee.

VAUGHN, Judge.

In passing upon the appeal from the Property Tax Commission, the Superior Court was limited in its inquiry to two questions of law: (1) whether there was any competent evidence to support its findings of fact, and (2) whether the findings of fact justify its legal conclusions and decisions. We hold that the court properly concluded that each question should be answered in the affirmative. In doing so, it is not necessary for us to reach or decide most of the questions so ably researched and briefed by petitioner.

In our view, the two critical findings of fact are that the property in question was acquired after January, 1969 (subsequent to the 1968 reappraisal of the apartments in which it is located) and that the property had never been listed for taxation either as acquisitions of personal property or improvements to real estate. The finding that all of the property made the subject of discovery was acquired after January 1969 is, among other places, supported by the record in the testimony of Tax Supervisor Pardue and the Exhibits labeled T # 46 and T # 47.

The record also supports the finding that the property had not been properly listed for tax purposes, either as acquisitions of personal property or addition to real estate. It is not necessary, therefore, to determine whether the subject property is real or personal. The statutes place the affirmative duty to list on the taxpayer. There is nothing in any of the statutes cited by petitioner that relieves him of that duty. The taxpayer having failed to list the property, it became the duty of the appropriate county official to list, appraise and assess the property for taxes.

If the subject property had been owned at the time of the 1968 reappraisal of apartments in which it is located, many of

the other arguments advanced by petitioner would require resolution and the solution would be more complex.

The judgment of the Superior Court is affirmed.

Affirmed.

Judges MORRIS and CLARK concur.

CATHERINE B. BLACK v. JAMES C. BLACK

No. 7626DC138

(Filed 4 August 1976)

Divorce and Alimony § 18— alimony and counsel fees pendente lite — scope of hearing

Since the final merits of an action are not before the trial judge upon a *pendente lite* hearing and the judge may not determine the ultimate property rights of the parties, the trial court in this action for alimony and counsel fees *pendente lite* erred in decreeing that the common law of N. C. providing that the husband is entitled, during coverture, to the rents and profits from property held by the husband and wife as tenants by the entirety is unconstitutional.

APPEAL by defendant from *Robinson, Judge.* Order entered 15 September 1975 in District Court, MECKLENBURG County. Heard in the Court of Appeals 25 May 1976.

This action for alimony without divorce was heard upon plaintiff's application for alimony and counsel fees *pendente lite.*

The trial judge decreed that the common law of North Carolina providing that the husband is entitled, during coverture, to the rents and profits from property held by the husband and wife as tenants by the entirety is unconstitutional because it is in violation of the equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 19 of the Constitution of North Carolina. He further decreed that plaintiff-wife was entitled to one-half the rents and profits from the property held by plaintiff and her husband as tenants by the entirety. Defendant was ordered to pay plaintiff one-half of such rents and profits.

The trial judge found that, except for his order concerning the rents and profits from the jointly held property, plaintiff

would be entitled to alimony and counsel fees *pendente lite*. However, because of his adjudication of plaintiff's rights to share the rents and profits, the trial judge did not order the payment of alimony or counsel fees *pendente lite*.

Defendant appealed.

Waggoner, Hasty & Kratt, by William J. Waggoner and Robert D. McDonnell, for the plaintiff.

Warren C. Stack and Richard D. Stephens for the defendant.

BROCK, Chief Judge.

The purpose of the speedy proceedings for alimony *pendente lite* is to give the dependent spouse subsistence and counsel fees pending trial of the action on its merits. This result places the dependent spouse on a more nearly equal footing with the supporting spouse for purposes of preparing for and prosecuting the dependent spouse's claim. The final merits of the action are not before the trial judge upon a *pendente lite* hearing. Therefore, upon a *pendente lite* hearing, the trial judge may not determine the ultimate property rights of the parties. *Kohler v. Kohler*, 21 N.C. App. 339, 204 S.E. 2d 177 (1974).

In this case the trial judge undertook to determine matters of constitutional proportions concerning the ultimate property rights of the parties. At this *pendente lite* stage of the proceedings, without consent of the parties to a hearing on the merits and waivers of jury trial, the trial judge was without jurisdiction to proceed in this action as he undertook to do.

The order appealed from is vacated, and the cause is remanded to the district court for such proceedings as may be appropriate.

Vacated and remanded.

Judges BRITT and VAUGHN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 AUGUST 1976

CHANCE v. JACKSON No. 768SC69	Wayne (70CVS59)	No Error
DISMUKES v. DISMUKES No. 7610DC215	Wake (74CVD3597)	Affirmed
ESKRIDGE v. ESKRIDGE No. 7620DC135	Union (74CVD1516)	Affirmed
FOX v. MILLER No. 7625DC177	Caldwell (68CVD161)	New Trial
HILL v. PARRISH No. 7619SC194	Randolph (75CVS269)	Affirmed
STATE v. COLLINS No. 7627SC266	Cleveland (75CR4827)	No Error
STATE v. DURDEN No. 7612SC140	Cumberland (75CR8264)	No Error
STATE v. HILL No. 7621SC223	Forsyth (75CR35234) (75CR35236)	No Error
STATE v. McRAE No. 7615SC258	Alamance (75CRS12096)	No Error
STATE v. THIGPEN No. 767SC249	Edgecombe (75CR9767) (75CR9769) (75CR9770)	No Error
STATE v. WILLIAMS No. 7612SC270	Cumberland (75CR14953)	No Error
STATE v. WRIGHT No. 7626SC241	Mecklenburg (75CR45253) (75CR45255) (75CR45256)	No Error
WILLIAMSON v. SALTER No. 7618SC35	Guilford (74CVS10772)	No Error

MOZELLE B. SPILLMAN, ADMINISTRATOR OF THE ESTATE OF JOYCE DARLENE GIBSON v. FORSYTH MEMORIAL HOSPITAL, DR. JULIAN KEITH, JR. AND ALICE JEAN JOHNSON SHERRILL, ADMINISTRATRIX OF THE ESTATE OF DR. FRANK HOWARD SHERRILL

No. 7621SC34

(Filed 18 August 1976)

1. **Evidence § 11— treatment of child by deceased doctor — testimony of mother not banned by dead man's statute**

The trial court in a wrongful death action did not err in allowing plaintiff, the mother of a deceased child, to testify concerning actions taken or not taken by a doctor, who was deceased at the time of the trial, during his examination and treatment of the child, notwithstanding the interest of the mother, since the transaction observed and testified to by her was not between her and the deceased doctor, but was between the deceased doctor and a third party, her daughter. G.S. 8-51.

2. **Evidence § 33— transactions at hospital — testimony not hearsay**

The trial court in a wrongful death action did not err in allowing plaintiff, the mother of a deceased child, to testify concerning what occurred when her child was taken to the hospital for the second and third times, since the testimony was not hearsay but was offered solely for the purpose of showing that certain statements were made.

3. **Evidence § 29— hospital records — admissibility**

The trial court in a wrongful death action properly allowed into evidence the hospital medical records of the treatment of deceased, since a proper foundation was laid for their admission, and defendant's contention that where the records are introduced to show malpractice on the part of a treating physician, they should be admitted only if it can be shown that the physician knew or should have known of the particular entry being made and the particular task having been performed is without merit.

4. **Evidence § 11— death certificate — signature of deceased doctor — no ban of dead man's statute**

The death certificate of plaintiff's intestate signed by defendant's intestate was not inadmissible by reason of the ban contained in G.S. 8-51, since the certificate recorded no transaction between plaintiff and defendant's intestate, and even had that been the case, record evidence does not fall within the ban of G.S. 8-51.

5. **Evidence § 50— hypothetical questions — facts supported by competent evidence**

Hypothetical questions asked an expert medical witness in this wrongful death action contained facts supported by competent evidence and were properly allowed by the trial court.

APPEAL by defendant from *Seay, Judge.* Judgment entered 18 September 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 15 April 1976.

This is a civil action for wrongful death of a 3 year 10 month old child. Joyce Darlene Gibson, plaintiff's intestate, died on 16 May 1968 from acute peritonitis resulting from a ruptured appendix. Plaintiff alleged her death was proximately caused by defendants' negligence in furnishing medical treatment.

Proceedings prior to trial resulted in dismissal of the action as to all defendants except Dr. Frank Howard Sherrill. Dr. Sherrill died during pendency of the action and the administratrix of his estate was substituted as party defendant.

At the trial Dr. Lide, the pathologist who performed an autopsy on Joyce Darlene Gibson, testified that the autopsy revealed the child had acute gangrenous appendicitis, which he defined as "a far advanced infection in the appendix," that the appendix had ruptured, and that the child's death resulted from peritonitis caused by the perforated appendix.

Jacqueline Gibson, mother of the child, testified that prior to the middle of May 1968 her child was in normal good health. On 13 May 1968 the child complained that her stomach hurt. That night Joyce awakened her mother screaming and saying, "Mama, my stomach." She was vomiting, her stomach was swollen, and her navel had turned purple. Her temperature taken rectally registered 105. With assistance of a neighbor, Mrs. Gibson took Joyce to Forsyth Memorial Hospital, where they arrived shortly after midnight on 14 May 1968. While in the waiting room, Joyce continued to vomit and cry. She would try to stand up when she was vomiting, but she could not. She would fall on her knees, and her mother had to hold her. She was taken to the examining room, where, in addition to her mother, there was present Dr. Sherrill and a nurse employed by the hospital.

Over defendant's objections, Mrs. Gibson was permitted to testify as to what she observed Dr. Sherrill do with regard to the treatment of her child. She testified, "He just checked her stomach," and "He mashed on her stomach," and that at that time Joyce "was screaming and crying." Mrs. Gibson testified that during the time the doctor was in the room, the child

vomited and that the color of the vomit was green, that the doctor gave her no instructions with regard to her child, no x-rays were made, and no blood or urine sample was taken.

Mrs. Gibson was given some medication, a "red looking medicine," and after the examination, she took her child home. At home, Joyce's condition worsened. On the following night Mrs. Gibson again took her to the Hospital Emergency Room. This time she was seen by a Dr. Calderon, who reviewed the chart made on the previous day by Dr. Sherrill. Dr. Calderon did not admit Joyce to the hospital, but called Mrs. Gibson's attention to a posted sign which stated that welfare patients had to go to the clinic and gave the hours that the clinic was open. After Dr. Calderon examined Joyce, Mrs. Gibson took her back home. During the remainder of the night Joyce continued to vomit and developed diarrhea. On the following day, 16 May 1968, Mrs. Gibson took Joyce back to the hospital, where they arrived at approximately 1:00 p.m. Joyce was immediately taken into the Emergency Room, where she was seen by Dr. Sherrill. She was given oxygen and other steps were taken, but within approximately thirty minutes she died.

Hospital records of Joyce Darlene Gibson were received in evidence after being identified by the medical records custodian. These records for the 14 May 1968 examination were signed by Dr. Sherrill and indicate his diagnosis as an upper respiratory infection, gastroenteritis, and possibly measles, with treatment of Polycillin and ASA suppositories. Records of the latter examination by Dr. Calderon indicate Joyce had a temperature of 102 degrees with a distended abdomen. X-rays taken at that time revealed a marked distention of the small bowel, and showed changes in the abdomen consistent with that found in a mechanical obstruction of the small bowel. The death certificate, signed by Dr. Sherrill on 17 May 1968, stated the immediate cause of death to be "Acute peritonitis, duration ? 4 days due to, or as a consequence of Perforated appendix due to, or as a consequence of Gastroenteritis with dehydration."

Dr. Michael Lawless, an Assistant Professor in the Department of Pediatrics at Bowman Gray School of Medicine and Director of Pediatrics at Reynolds Memorial Hospital Family Health Center, was found by the court to be an expert medical witness specializing in the field of Pediatrics. Dr. Lawless testified, in response to a hypothetical question, that in his opinion

the medical treatment given Joyce Gibson by Dr. Sherrill "was not standard acceptable medical treatment in Winston-Salem or similar communities in this country."

Defendant presented no evidence.

The jury found that plaintiff's intestate's death was caused by the negligence of the defendant as alleged in the complaint and awarded damages of $65,000. From entry of judgment in accordance with the verdict, defendant appealed.

White and Crumpler by Harrell Powell, Jr. and Michael J. Lewis for plaintiff appellee.

Jordan, Wright, Nichols, Caffrey & Hill by Welch Jordan and Karl N. Hill, Jr. for defendant appellant.

PARKER, Judge.

[1] Defendant contends the court erred in permitting the child's mother, Jacqueline Gibson, to testify concerning actions taken or not taken by Dr. Sherrill, now deceased, during his examination and treatment of her daughter. Defendant contends this violated G.S. 8-51 in that it permitted a person interested in the event to testify "concerning a personal transaction or communication between the witness and the deceased person." Mrs. Gibson did not testify concerning any conversation between herself and Dr. Sherrill. Her testimony related solely to what she observed take place in the conduct of the doctor and the child during the examination, i.e., the doctor "mashed" on the child's stomach, the child "was screaming and crying," the child vomited a "green" vomit in the doctor's presence, and no x-rays, blood samples, or urine samples were taken during the examination. G.S. 8-51 does not prohibit this testimony. The transaction observed and testified to by Mrs. Gibson was not one between her and the deceased person, Dr. Sherrill, but was of one between the deceased and a third party, her daughter. Therefore, notwithstanding her interest, she was properly allowed to testify concerning it. *Burton v. Styers,* 210 N.C. 230, 186 S.E. 248 (1936); *Zollicoffer v. Zollicoffer,* 168 N.C. 326, 84 S.E. 349 (1915); *Johnson v. Cameron,* 136 N.C. 243, 48 S.E. 640 (1904); *McCall v. Wilson,* 101 N.C. 598, 8 S.E. 225 (1888); 1 Stansbury's N. C. Evidence, Brandis Revision, § 74, p. 228.

[2] Defendant's second assignment of error, based on exceptions 12, 13, 14, 15, 16, and 25, is directed to the court's over-

ruling defense objections and permitting Mrs. Gibson to testify concerning what occurred when her child was seen by Dr. Calderon on her second visit to the hospital. Defendant's contention that this testimony was hearsay is without merit. "If a statement is offered for any purpose other than that of proving the truth of the matter stated, it is not objectionable as hearsay." 1 Stansbury's N. C. Evidence, Brandis Revision, § 141, p. 467. Here, Mrs. Gibson's testimony concerning statements made by Dr. Calderon was not offered for the purpose of proving the truth of the matters stated by him. It was offered solely to show that the statements were made, and for that purpose it was relevant and competent to show the treatment, or lack of treatment, accorded to her child. It is true, as defendant contends, that there is no evidence that Dr. Calderon was acting as the agent or employee of Dr. Sherrill, but there was evidence that before he examined the child, Dr. Calderon referred to the chart that had been made on the previous night by Dr. Sherrill. It was for the jury to determine whether the faulty diagnosis made by Dr. Sherrill, as recorded by him on that chart, was a material factor in misleading Dr. Calderon so that he continued the faulty treatment. If so, and to that extent, Dr. Sherrill would be responsible for the consequences of the continued faulty treatment. Mrs. Gibson's testimony which is the subject of defendant's second assignment of error was relevant and competent to show that treatment, and defendant's second assignment of error is overruled.

We also find no error in the court's overruling defense objections and permitting Mrs. Gibson to testify concerning what she observed take place at the time of her third and final visit to the hospital when her child died. Although she referred in this testimony to what "they" did and said at that time, without further identifying who "they" were but obviously referring to hospital personnel, defendant could not be prejudiced, since nothing which Mrs. Gibson testified at that time tended to show any negligence on the part of Dr. Sherrill or anyone else. Her testimony that "they" asked her to step out of the examination room so that "they" could work with her child did not constitute hearsay, since it was not offered to prove the truth of anything contained in the statement which she testified "they" made, but solely for the purpose of showing that the statements were made. Counsel for defendant complain in their brief that "[w]hen Mrs. Gibson took her sick child to the hospital emer-

gency room for the third and last time, the Court allowed her to testify in a highly emotional manner concerning what 'they' and 'them' said and did as the child was in the extremis and dying." The record does not support this, although the events to which Mrs. Gibson testified would quite naturally evoke strong feelings on her part. In any event, the witness's testimony was not rendered incompetent even if, as defendant complains, it may have been given "in a highly emotional manner." Defendant's third asisgnment of error is overruled.

[3] Defendant's fourth assignment of error is directed to the admission into evidence of the medical records of the treatment of Joyce Darlene Gibson at Forsyth Memorial Hospital during the period from 14 May through 16 May 1968. Hospital medical records are admissible upon proper foundation being laid. *Sims v. Insurance Co.* 257 N.C. 32, 125 S.E. 2d 326 (1962). Here, the records were identified by the hospital custodian, who testified they were kept in the normal course of business of the hospital. By pre-trial order defendant stipulated they were genuine, and neither at trial nor on this appeal has defendant contended that there was any lack of a proper foundation. In their brief defendants' counsel state: "If the evidence were offered purely to show what was done or not done to the patient, there would probably be no difficulty with their admission." That would appear to be precisely the purpose for which the records were admitted in this case. Defendant's counsel cites no authority nor have they advanced any persuasive reason for their contention that where the records are introduced to show malpractice on the part of a treating physician, they should be admitted "only if it can be shown that the physician knew, or in the exercise of due care should have known of the particular entry being made and the particular task having been performed." We perceive no sound reason for such a limitation. Moreover, the critical record in this case, being the record made when the child was first examined at the hospital by Dr. Sherrill on 14 May 1968 on the occasion of her first visit, bears Dr. Sherrill's signature as the emergency room attending physician. We find the hospital records were admissible in evidence in this case and defendant's fourth assignment of error is overruled.

[4] Defendant's fifth assignment of error challenges the admission in evidence of the death certificate of Joyce Darlene Gibson. Under G.S. 130-66(b), a properly certified copy of a

death certificate "shall be considered for all purposes the same as the original and shall be prima facie evidence of the facts therein stated." In a civil action, a death certificate may be introduced "as evidence of the fact of death, the time and place where it occurred, the identity of the deceased, the bodily injury or disease which was the cause of death, the disposition of the body and possibly other matters relating to the death." *Branch v. Dempsey,* 265 N.C. 733, 748, 145 S.E. 2d 395, 406 (1965). [For constitutional limitations on the use of a death certificate as evidence against a defendant in a criminal case, see *State v. Watson,* 281 N.C. 221, 188 S.E. 2d 289 (1972)]. Here, defendant stipulated by pre-trial order to the genuineness of the death certificate. It shows on its face that it was signed by Dr. Frank H. Sherrill on 17 May 1968. It was admissible as prima facie evidence of the facts therein stated. G.S. 130-66(b). Defendant's contention that "(t)his death certificate recorded, at least in part, a transaction between the dead child's mother and the late Dr. Sherrill, the defendant's intestate," and that "(t)o this extent the contents of the death certificate should have been excluded from consideration by the jury by reason of the ban contained in G.S. 8-51," is without merit. The certificate recorded no transaction between the child's mother and the doctor, and even had that been the case, record evidence does not fall within the ban of G.S. 8-51. See, *Flippen v. Lindsey,* 221 N.C. 30, 18 S.E. 2d 824 (1942). Defendant's fifth assignment of error is overruled.

[5] Defendant assigns error to the court's overruling defense objections to hypothetical questions asked by plaintiff's counsel of the witness, Dr. Michael Lawless. Defendant contends the questions were fatally defective because some of the facts stated therein, on the basis of which the witness was asked to express his opinion, were not supported by competent evidence. In this connection defendant repeats the contentions which have already been dealt with in this opinion as to the competency of the plaintiff's evidence. We have carefully reviewed the challenged hypothetical questions, and we find the facts stated therein to be supported by competent direct evidence or by reasonable inferences which the jury could legitimately draw from the evidence. That one of the questions made reference to the x-rays which were only made at the time of the child's second visit to the hospital and which, insofar as the record discloses, may never have been seen by Dr. Sherrill, does

not render the question fatally defective. The answers given by Dr. Lawless make it abundantly clear that he did not express his opinion that Dr. Sherrill's treatment of the child failed to comply with standard acceptable medical practice because Dr. Sherrill failed to heed what was on x-rays which Dr. Sherrill may never have seen. Rather, Dr. Lawless's testimony makes it clear that he expressed that opinion because Dr. Sherrill, among other things, failed to have adequate diagnostic tests, including x-rays, made when the child was first brought to him for treatment.

That Dr. Lawless was a medical student and had been graduated with an M.D. degree in 1968, the year in which the child died, did not disqualify him from expressing an opinion as to whether Dr. Sherrill's treatment of the child in 1968 was in accord with standard, approved and accepted medical practice in Winston-Salem and other similar communities. *Dickens v. Everhart,* 284 N.C. 95, 199 S.E. 2d 440 (1973).

We have carefully examined defendant's exceptions to the court's charge to the jury, and we find the charge, when considered contextually and as a whole, to be free from prejudicial error.

Defendant's motions to set aside the verdict and for a new trial on the grounds that the verdict as to damages was grossly excessive and that the verdict was contrary to the greater weight of the evidence were addressed to the sound discretion of the trial judge, and his rulings thereon will not be disturbed on this appeal.

No error.

Judges MORRIS and MARTIN concur.

IN RE: MARY ALBERTA HATLEY

No. 7515DC762

(Filed 18 August 1976)

1. Insane Persons § 1— involuntary commitment — required findings

Prerequisite to a valid involuntary commitment to a mental health care facility, G.S. 122-58.7(i) mandates that the district court make

two distinct findings: (1) that the respondent is mentally ill or inebriate as those terms are defined in G.S. 122-36, and (2) that the respondent is imminently dangerous to himself or others.

2. **Insane Persons § 1— careless and reckless driving — respondent imminently dangerous to herself or others**

Evidence that respondent drove her car carelessly and recklessly was sufficient to support the trial court's determination that respondent was imminently dangerous to herself or others.

Judge MORRIS dissenting.

APPEAL by respondent from *Paschal, Judge.* Judgment entered 4 August 1975 in District Court, ORANGE County. Heard in the Court of Appeals 20 January 1976.

This is a proceeding for involuntary commitment to a mental health facility pursuant to Ch. 122, Article 5A, of the General Statutes.

On 25 July 1975 respondent's mother submitted a sworn petition alleging that her daughter, Mary Alberta Hatley, was mentally ill and imminently dangerous to herself or others. She based her opinion on respondent's erratic behavior, her threatening a relative with a brick, driving an automobile carelessly and recklessly, her inability at times to communicate with others, her failure to react normally in "caring for herself," and being "out of contact with reality."

A magistrate ordered that respondent be taken into custody for purpose of being examined by a qualified physician. Pursuant to the order, respondent was examined by Dr. Tom Wilson, a physician at North Carolina Memorial Hospital in Chapel Hill. He concluded that respondent was mentally ill and imminently dangerous to herself or others and recommended that she be committed to John Umstead Hospital.

At Umstead Hospital, respondent was examined by Dr. M. Elmaghraby, a physician, who confirmed Dr. Wilson's opinion and recommended that she be hospitalized for medication and rehabilitation.

On 4 August 1975 a hearing was held on the petition in district court. After receiving evidence from the petitioner, (the respondent offering no evidence) and considering the medical reports, the court made findings of fact and ordered that respondent be committed to Umstead Hospital for a period not to exceed 90 days.

Respondent appealed.

Attorney General Edmisten, by Isaac T. Avery III, for the State.

Jerry P. Davenport for respondent appellant.

BRITT, Judge.

G.S. 122-58.7(i) provides:

> "To support a commitment order, the court is required to find, by clear, cogent, and convincing evidence, that the respondent is mentally ill or inebriate, and imminently dangerous to himself or others. The court shall record the facts which support its findings."

[1] Prerequisite to a valid commitment the quoted statute mandates that the district court make two distinct findings: (1) that the respondent is mentally ill or inebriate as those terms are defined in G.S. 122-36, and (2) that the respondent is "imminently dangerous to himself or others." *In re Carter*, 25 N.C. App. 442, 213 S.E. 2d 409 (1975).

[2] In the case at hand, the district court found and concluded that respondent was mentally ill and there is no exception to that finding and conclusion. Respondent's only exception is to the finding that she was imminently dangerous to others "without there being any evidence that there was a recent overt act, attempt or threat."

The district court's finding No. 7 is as follows:

> "7. That based on the evidence the Court finds that the respondent is imminently dangerous to herself in that she was driving in a careless and reckless manner such that the lives of persons with whom she came in contact might or could be endangered and in that she entered a house at a time when that house was not physically present [sic] by that neighbor who usually occupied the house."

In her testimony, after stating that respondent was born in 1943 and had been treated in mental institutions on several occasions, respondent's mother testified that " . . . [s]he could be a danger in that when she is driving a car in the condition that she is currently in, she may operate the car as in a way to endanger others on the road. And she has been driving her car

recently." On cross-examination she testified that respondent drove carelessly and dangerously in that when "backing up" she would not look over her shoulder as she should and would "back up" too fast. She further testified that when driving respondent would not "make the proper sign."

We think the court's finding, however inartfully stated, that respondent was imminently dangerous to herself and others was adequately supported by the evidence relating to her driving an automobile. Needless to say, an automobile driven by an incompetent driver can be a lethal instrumentality, a real danger to the driver and other people on the highway.

Respondent insists that to be valid a finding that one is imminently dangerous to herself or others must be based on evidence showing a recent overt act, attempt or threat and that such evidence was lacking in this case. Assuming, *arguendo,* that respondent's argument is correct, we think there *was* evidence of an overt act, namely, the improper operation of an automobile.

It will be noted that respondent does not challenge the determination that she was mentally ill. It could be persuasively argued that the mere operation of an automobile on a public highway by a mentally ill person constitutes an overt act imminently dangerous to the driver and others. Here, the evidence not only showed that respondent was driving her car but that she was driving carelessly and dangerously.

The judgment is

Affirmed.

Chief Judge BROCK concurs.

Judge MORRIS dissents.

Judge MORRIS dissenting.

Respondent, involuntarily committed to a State mental institution, contends that the District Court, proceeding without benefit of clear, cogent and convincing evidence, erred in entering its commitment order. I am constrained to agree.

There is no question that civil commitment is a drastic and critical intervention by the State into the private affairs

of its citizenry. See: Livermore, et al, "On the Justifications for Civil Commitment," 117 U. Pa. Law Rev. 75-96 (1968). Consequently, our Legislature carefully limited the scope and range of behavior appropriate for involuntary commitment and provided at the outset of Chapter 122, Article 5A of our General Statutes " . . . that no person shall be committed . . . unless he is mentally ill or an inebriate *and* imminently dangerous to himself or others; that a commitment will be accomplished under conditions that protect the dignity and constitutional rights of the person; and that committed persons will be discharged as soon as a less restrictive mode of treatment is appropriate." (Emphasis supplied.) G.S. 122-58.1.

The Legislature further provided that judicial commitment orders must be supported by clear, cogent and convincing evidence. Without such evidence, and the requisite supporting findings of fact, no commitment can lawfully issue. See: G.S. 122-58.7(i).

Finally, the General Assembly, amplifying on this basic process, defined the fundamentally important terms:

> "§ 122-58.2 *Definitions.*—As used in this Article: (1) The phrase 'dangerous to himself' includes, but is not limited to, those mentally ill or inebriate persons who are unable to provide for their basic needs for food, clothing, or shelter; (2) The words 'inebriety' and 'mental illness' have the same meaning as they are given in G.S. 122-36 . . . "
>
> "§ 122-36. *Definitions.*— . . .
>
> (d) The words 'mental illness' shall mean an illness which so lessens the capacity of the person to use his customary self-control, judgment, and discretion in the conduct of his affairs, and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control. The words 'mentally ill' shall mean a person with a mental illness."

G.S. 122-58.7(i) provides that "[t]o support a commitment order, the court is required to find, by clear, cogent, and convincing evidence, that the respondent is *mentally ill or inebriate and imminently dangerous to himself or others.* The court shall record the facts which support its findings." (Emphasis supplied.)

In view of these overriding statutory guidelines, I am of the opinion that the District Court's commitment order must be vacated. There is no question but that respondent experienced mental illness in the past and that the mental condition adversely affected both respondent's life and the lives of those individuals personally involved with the respondent. Arguably, respondent may have exhibited certain signs of mental illness at the time of the District Court hearing. However, in my opinion there is not sufficient clear, cogent and convincing evidence indicating that respondent was either mentally ill or imminently dangerous. More specifically, this record is devoid of any evidence either showing or tending to show that respondent was unable to provide for her own needs. Respondent's perception of reality and her overall conception of her situation in life may have been, and may still be, burdened by psychologically-based infirmities, but this unfortunate condition did not warrant a finding that she was dangerous to herself or others.

As indicated above, the critical problem in this case is not related to the question of mental illness, but to the more intangible question of whether respondent is in fact "dangerous" to herself or others, within the meaning of the statute.

I am aware of the considerable criticism leveled against the "dangerous" standard and the various suggestions for reform that have been advanced in recent years. See: *Livermore, et al, supra; Peszke,* "Is Dangerousness an Issue for Physicians in Emergency Commitments?" American Journal of Psychiatry, 132:8 pp. 825-828 and Comment by Stone at pp. 829-832 (Aug. 1975); Dershowitz, "Psychiatry in the Legal Process: A Knife that Cuts Both Ways." 4 Trial 29-33, (Feb.-March 1968). However, notwithstanding this criticism, it appears that the "dangerous" standard has been and continues to be an essential element in the commitment process. See: Brakel and Rock, The Mentally Disabled and the Law (Revised ed. 1971); 92 A.L.R. 2d 570, "Right, Without Judicial Proceeding to Arrest and Detain One Who is, or is Suspected of Being, Mentally Deranged"; 44 C.J.S., Insane Persons, §§ 64 et seq. Also see *O'Connor v. Donaldson,* 422 U.S. 563, 45 L.Ed. 2d 396, 95 S.Ct. 2486 (1975) (especially concurring opinion of Burger, C.J.); *Cross v. Harris,* 418 F. 2d 1095 (D.C. Cir. 1969); *Millard v. Harris,* 406 F. 2d 964 (D.C. Cir. 1968).

Certainly "dangerousness" is, as the critics suggest, potentially an imprecise measurement of human behavior. To clarify

its meaning and to retain its validity as a measuring device, the courts must consider the issue of dangerousness on a case-by-case basis with special emphasis on the likelihood of harm. As one court has stated:

> " . . . [T]he State must balance the curtailment of liberty against the danger of harm to the individual or others. The paramount factor is the interest of society which naturally includes the interest of the patient in not being subjected to unjustified confinement. . . . [T]he 'science' of predicting future dangerous behavior is inexact, and certainly is not infallible. . . . [T]he mere establishment of a mental problem is not an adequate basis upon which to confine a person who has never harmed or attempted to harm either himself or another. However, we are of the opinion that a decision to commit based upon a medical opinion which clearly states that a person is *reasonably expected to engage in dangerous conduct, and which is based upon the experience and studies of qualified psychiatrists,* is a determination which properly can be made by the State." *People v. Sansone,* 18 Ill. App. 3d 315, 309 N.E. 2d 733, 739 (1974). (Emphasis supplied.)

In short, the State must balance its duty to protect its citizens from harm against the right of any one person to be free from restraint and interference barring conviction of the commission of a crime. This balance, however, should tilt in favor of involuntary commitment when it can be shown by clear, cogent and convincing evidence that the mentally ill or inebriate respondent is incapable of " . . . surviving safely in freedom by himself or with the help of willing and responsible family members or friends." *O'Connor v. Donaldson,* 45 L.Ed. 2d, at 407. Underlying this entire process is the humanistic consideration that both the individual respondent and society would be better off if a commitment order would issue.

This is obviously a situation where respondent's family would be more comfortable if respondent were institutionalized. However, the evidence that "she *could* be a danger in that when she is driving a car in the condition that she is currently in, she *may* operate the car in a way to endanger others on the road, and she has been driving her car recently" is not the clear, cogent, and convincing evidence required by the statute. Nor does the evidence elicited on cross-examination that respondent

drove carelessly and dangerously in that when "backing up" she would not look over her shoulder as she should and would "back up" too fast, or would not "make the proper sign," measure up to the required standard. If this type of evidence were sufficient to support a finding that a respondent is imminently dangerous to herself or others, I fear many of us sometimes engage in conduct which would support such a finding if commitment proceedings were begun. While I sympathize with the family and friends and neighbors of persons whose erratic behavior creates real problems in the home and community, I do not interpret the statute, as written, as affording the relief sought in this situation. I do not think the evidence is sufficient to support a finding or conclusion that respondent is imminently dangerous to herself or others.

I would vote to vacate the judgment.

WILLIAM N. NORTON v. H. B. SAWYER

No. 754SC1057

(Filed 18 August 1976)

Rules of Civil Procedure § 60— motion to set aside judgment — excusable neglect — meritorious defense — one year time limit for making motion

Defendant's motion to set aside a judgment entered against him for damages for an alleged breach of contract was properly denied, though defendant's failure to file answer was due to excusable neglect, his counsel having been negligent and defendant having relied upon him, and though defendant had a meritorious defense—a denial that he ever made a contract with plaintiff, since defendant's motion was not made within one year as required by G.S. 1A-1, Rule 60(b)(1), and since the interests of justice would not best be served by setting the judgment aside pursuant to G.S. 1A-1, Rule 60(b)(6) where plaintiff could not be placed in the same position held by him prior to entry of the judgment.

APPEAL by defendant from *Graham, Judge.* Judgment entered 22 September 1975 in Superior Court, ONSLOW County. Heard in the Court of Appeals 9 April 1976.

Defendant seeks to set aside a judgment entered against him for damages for an alleged breach of contract with plaintiff. Sawyer offered an affidavit which stated the following. On 11 July 1970 he received a complaint filed by plaintiff. Upon re-

ceipt of the complaint he employed attorney Marion Godwin to defend him against plaintiff's claim. Sawyer entreated Godwin to file an answer but Godwin did not do so. Godwin assured him that he was "working things out" with plaintiff's attorney so that plaintiff would look to co-defendant B. F. Diamond Construction Company, Inc. for recovery. Despite this, on 6 February 1974 a default judgment for $25,000 was entered on plaintiff's claim against Sawyer. Sawyer stated that he had truly believed Godwin was representing his interests, that he again contacted Godwin after entry of the default judgment and was assured that Godwin "would take care of it," and that he met with plaintiff and plaintiff's attorney and learned that plaintiff's attorney did not have anything worked out with attorney Godwin. Sawyer "continued to beg" Godwin to seek relief and Godwin "continued to reassure" him that he would gain relief. Sawyer discovered in early June 1975 that Godwin had closed his law office, and he was unable to find Godwin thereafter. He employed his present counsel, whose efforts have been hampered by the fact that papers in the court file on this case are missing and presumed lost. Sawyer contends that he has a complete defense to plaintiff's claim since he never made a contract with plaintiff.

A hearing was held on Sawyer's motion to set aside the judgment against him. At the hearing Godwin appeared and testified for Sawyer. He stated that Sawyer had contacted him at least twenty times regarding the status of the claim, that he assured Sawyer on each occasion that everything was all right, and that the default judgment was the result of a misunderstanding between plaintiff's counsel and himself. Plaintiff presented a clerk of court who testified that the case had appeared on trial calendars for 7 February 1972 and 11 February 1974, that either defendant Sawyer or attorney Godwin would have been mailed a copy of the calendars, but that she did not know whether or not Sawyer himself was mailed a copy of the calendars.

Plaintiff testified that he and his attorney met with Sawyer before obtaining the default judgment, that his attorney advised Sawyer to see his attorney and have an answer filed, and that he would have lost everything he had done on this particular job if he had not gotten the judgment against Sawyer.

The motion of the defendant Sawyer to set aside the judgment was denied and defendant appealed.

Warlick, Milsted & Dotson, by Marshall F. Dotson, Jr., for plaintiff appellee.

Bailey & Gaylor, by Edward G. Bailey, for defendant appellant.

MARTIN, Judge.

Motions to set aside a final judgment are governed by Rule 60(b) of the North Carolina Rules of Civil Procedure which provides in pertinent part:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> * * *
>
> (6) Any other reason justifying relief from the operation of the judgment."

While motions under Rule 60(b)(1) must be brought within one year after a judgment is taken or entered, motions under Rule 60(b)(6), to set aside a final judgment for "[a]ny other reason justifying relief from the operation of the judgment" may be brought within "a reasonable time." G.S. 1A-1, Rule 60(b). The broad language of clause (6) "gives the courts ample power to vacate judgments whenever such action is appropriate to accomplish justice." 3 Barron and Holtzoff, Federal Practice and Procedure (Wright Ed.) § 1329 at 417.

Findings of fact made by the trial court upon a motion to set aside a judgment by default are binding on appeal if supported by any competent evidence. *Moore v. Deal,* 239 N.C. 224, 79 S.E. 2d 507 (1954). It is our opinion, and we so hold, that in the instant case there is competent evidence to support the findings of fact. The conclusions of law made by the judge upon the facts found by him are reviewable on appeal. *Moore v. Deal, supra.* We now test the judgment entered by the trial court in accordance with that precept.

Justice Parker (later Chief Justice) set forth the general principles of law established by the Court's decisions, as to when relief will be afforded a client against whom a judgment

by default has been rendered by the negligence of his attorney, in *Moore v. Deal, supra,* as follows:

> "[O]rdinarily a client is not charged with the inexcusable neglect of his attorney, provided the client himself has exercised proper care. (Citations omitted.) 'We have consistently held that where the negligence is that of the attorney, and not of the client against whom a judgment by default is rendered, relief will be afforded the latter.' (Citations omitted.)
>
> 'In considering the propriety of the order entered on the hearing of defendant's motion, we must remember that the excusability of the neglect on which relief is granted is that of the litigant, not that of the attorney. The neglect of the attorney, although inexcusable, may still be cause for relief.' (Citations omitted.)
>
> The standard of care required of the litigant is that which a man of ordinary prudence usually bestows on his imporant business. (Citations omitted.)
>
> The attorney employed, 'must be one licensed to practice in this State, and his negligence on which the prayer for relief is predicated must have been some failure in the performance of professional duties which occurred prior to and was the cause of the judgment sought to be vacated.' (Citations omitted.)
>
> A further requirement seems to be that the lawyer employed must be reputable, skilled and competent, and that the client must impart to him facts constituting his defense. (Citations omitted.) However, the mere employment of counsel is not enough. (Citation omitted.) The client may not abandon his case on employment of counsel, and when he has a case in court he must attend to it. (Citations omitted.)
>
> The party seeking to set aside a default judgment must be without fault. (Citations omitted.)
>
> The defendant must have a real or substantial defense on the merits, otherwise the court would engage in the vain work of setting a judgment aside when it would be its duty to enter again the same judgment on motion of the adverse party. (Citations omitted.)"

That defendant's attorney Godwin was guilty of inexcusable neglect of his client Sawyer's case is not debatable. We now test the court's conclusion of law "that the neglect of the defendant was inexcusable." If the court finds correctly that the negligence was inexcusable, of course, that defeats the motion to set aside the judgment. The test of the negligence of the client or party is whether he has acted as a man of ordinary prudence while engaged in transacting important business. *Lumber Company v. Cottingham,* 173 N.C. 323, 92 S.E. 9 (1917). The burden was upon the defendant to show that he gave the case "such attention as a man of ordinary prudence usually gives to his important business." *Norton v. McLaurin,* 125 N.C. 185, 34 S.E. 269 (1899). Summons and complaint were served on defendant in July 1970 and within a few days he employed attorney Godwin and requested said attorney to represent him and file answer. Attorney Godwin undertook to represent defendant and agreed to file an answer on his behalf. In January 1974 the plaintiff and the defendant Sawyer went to the office of the plaintiff's attorney and the defendant was then and there advised to see his attorney and file an answer. No answer or other pleading was filed by defendant's attorney and on 6 February 1974 a default judgment was entered by the Clerk of Superior Court.

Excusable neglect is something which must have occurred at or before entry of the judgment, and which caused it to be entered. *Lumber Co. v. Cottingham, supra.* What occurred after the entry of the default judgment is not to be considered except as it relates to whether the motion to vacate was made in "reasonable time."

The distinction between the neglect of parties to an action and the neglect of counsel is recognized by our courts, and except in those cases in which there is a neglect or failure of counsel to do those things which properly pertain to clients and not to counsel, and in which the attorney is made to act as the agent of the client to perform some act which should be attended to by him, the client is held to be excusable for the neglect of the attorney to do those things which the duty of his office of attorney requires. It was the duty of the attorney to file the defendant's answer. The client is not presumed to know what is necessary. When he employs counsel and communicates the merits of his case to such counsel, and the counsel is negligent, it is excusable on the part of the client, who may reasonably

rely upon the counsel's doing what may be necessary on his behalf. *Schiele v. Insurance Co.*, 171 N.C. 426, 88 S.E. 764 (1916).

Defendant was a co-defendant of B. F. Diamond Construction Company, Inc. There was evidence tending to show that plantiff's counsel and defendant's counsel were trying to work things out. The mere fact that plaintiff's counsel had not moved for default judgment against defendant and was insisting that he file answer indicates that plaintiff's counsel considered the defendant Diamond as the responsible party. It also lends credence to the claims of defendant's counsel that he had an "understanding." If not, why did plaintiff's counsel wait from 1970 to 1974 to move for default judgment? The defendant was "betwixt and between," relying on the advice and promise of his counsel, which he had a right to do and the advice of plaintiff's counsel, his adversary. Under these circumstances, we cannot say that defendant did not act as a man of ordinary prudence.

In order to vacate a judgment there must be both excusable neglect and a meritorious defense. It would be idle to vacate a judgment if there is no real and substantial defense on the merits. It is therefore essential that the judge find that defendant has a meritorious defense which could be set up if the judgment is set aside. The mere denial of the obligation set out in the complaint will not support a finding of a meritorious defense.

Here, however, the defendant not only avers that he has a complete defense but denies that he ever made a contract with plaintiff and explains that "he in fact had it expressly understood among all the parties that he would not do any work on the project . . . unless it was agreed that William E. Norton should not look to him for payment of any kind. . . . " We hold, therefore, that defendant had a substantial defense on the merits.

Motions under Rule 60(b)(1) must be brought within one year after a judgment is entered. In the present case the default judgment was entered in February 1974 and defendant's motion was not made until July 1975. Therefore, defendant's motion was not timely made under Rule 60(b)(1). Thus, in order for defendant to prevail his motion must be cognizable

under Rule 60(b)(6), which may be brought within a "reasonable time." G.S. 1A-1, Rule 60(b).

Some federal courts have held that errors or omissions of counsel are not "any other reason" justifying relief under Rule 60(b)(6) from a final judgment. It was also held that Rules 60(b)(1) and 60(b)(6) were mutually exclusive, so that any conduct which generally fell under the former could not stand as a ground for relief under the latter. Further, it has been held that "excusable neglect" as a ground for relief was expressly covered by Rule 60(b)(1) and that the time limit clearly intended by the rules for relief based on excusable neglect under clause (1) cannot be avoided by merely calling excusable neglect "any other reason" in order to invoke Rule 60(b)(6) which has no specific time limitation.

In some cases, on the other hand, the federal courts have found that the errors or omissions of counsel in particular circumstances—circumstances which other courts might have been disposed to rely on as showing "gross neglect"—were reasons justifying relief from the operation of a judgment under Rule 60(b)(6). 15 A.L.R. Fed. 193, § 14, page 255. In this connection it has been held that "gross neglect" of counsel is an extraordinary circumstance taking the case out of clause (1) and justifying relief under clause (6).

While Rule 60(b)(6) has been described as "a grand reservoir of equitable power to do justice in a particular case," 7 Moore's Federal Practice, § 60.27[2] at 375 (2d ed. 1975), it should not be a "catch-all" rule. Here, defendant's motion to reinstate was under 60(b)(1) and was barred by the one year time limit in clause (1). While Rule 60(b)(6) vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice, nevertheless, we hold that a judge cannot do so without a showing based on competent evidence that justice requires it.

In the instant case on the 25th day of February 1974, the plaintiff entered a stipulation of dismissal with prejudice against the defendant B. F. Diamond Construction Company, Inc. Therefore the parties cannot now be restored to their original claims. Plaintiff testified: "If I couldn't get a judgment against Sawyer I would have lost everything I had done on the Cape Fear River job." Thus, we cannot say that "the interests of justice will best

be served" by setting the judgment aside. Accordingly, the judgment of the trial court is affirmed.

Affirmed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA, EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA AUTOMOBILE RATE ADMINISTRATIVE OFFICE, NATIONWIDE MUTUAL INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, THE AETNA CASUALTY AND SURETY COMPANY, HARTFORD ACCIDENT AND INDEMNITY COMPANY, GREAT AMERICAN INSURANCE COMPANY, UNITED STATES FIDELITY AND GUARANTY COMPANY, LUMBERMEN'S MUTUAL CASUALTY COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, IOWA NATIONAL MUTUAL INSURANCE COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, UNIGARD MUTUAL INSURANCE COMPANY, THE SHELBY MUTUAL INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

No. 7510INS538

(Filed 18 August 1976)

Insurance § 79.1— automobile liability insurance rates — order unsupported by evidence

Order of the Insurance Commissioner fixing automobile liability insurance rates which included a supplementary rate level reduction factor of 5 percentage points for both bodily injury and property damage rates was unsupported by material and substantial evidence where the Commissioner adopted his expert witness's testimony that such reduction was necessary, and the witness based his figure on extremely tenuous theories derived from his personal evaluation of the results and effect of the "energy crisis" and general economic conditions on N. C. drivers.

Judge MARTIN dissenting.

APPEAL by North Carolina Automobile Rate Administrative Office and certain member companies from order of the Commissioner of Insurance filed 28 March 1975. Heard in the Court of Appeals 16 October 1975.

Pursuant to statutory mandate, the North Carolina Automobile Rate Administrative Office, hereinafter referred to as

"Rate Office" files with the Commissioner of Insurance on or before 1 July of each year data compiled under the provisions of G.S. 58-248 and a rate review based on that data. The 1 July 1974 filing used the latest available statistical data reflecting the underwriting experience of all the member companies for the two years ending 30 June 1972 and 30 June 1974. The same rate making process was used by the Rate Office in the 1974 filing as had been used by it for the filing of 1973 and those of prior years. The filing was amended and the amended filing was made on 2 January 1975. This amended filing became the subject matter of the hearing and proposed a rate level reduction of 13.3% for bodily injury and a rate level increase of 22.5% for property damage, or an overall rate level increase of 0.9% for bodily injury and property damages combined, as compared with the original 1974 filing reflecting a proposed overall rate level increase of 3.2%.

On 20 September 1974, the Attorney General intervened on behalf of the using and consuming public of the State of North Carolina. On 25 and 26 November 1974, the Commissioner of Insurance conducted a public hearing which was continued to and resumed on 10 December 1974 and 6, 7, 15, 21, 22, 23, 24, 27, 28, 29 January 1975, and 4, 7 February 1975 and 10 March 1975, concluding on 17 March 1975. While the 1974 filing was pending, the 1973 filing was pending, the order issued therein having been appealed to this Court. We reversed the Commissioner of Insurance, 24 N.C. App. 228, 210 S.E. 2d 439 (1974), and the Commissioner and Attorney General appealed, by reason of a dissent, to the Supreme Court of North Carolina, which affirmed the reversal, 287 N.C. 192, 214 S.E. 2d 98 (1975), and ordered the case remanded to the Commissioner of Insurance for disposition of the filing according to law.

The Commissioner of Insurance entered an order on 28 March 1975, directing that "private passenger automobile liability insurance rates for use in North Carolina in the future be decreased by 23.8% for bodily injury and increased by a (sic) 2.5% for property damage to be effective on May 1, 1975." The Rate Office and the named companies appealed.

Attorney General Edmisten, by Assistant Attorney General Isham B. Hudson, Jr., for Commissioner of Insurance, appellee.

Allen, Steed & Pullen, P.A., by Arch T. Allen and Lucius W. Pullen; Broughton, Broughton, McConnell & Boxley, by J. Melville Broughton, Jr.; Young, Moore & Henderson, by Charles H. Young; Manning, Fulton & Skinner, by Howard E. Manning, for defendant appellants.

MORRIS, Judge.

This case is before us for review upon seven assignments of error based on 147 exceptions. The assignments of error are presented by defendants under four principal arguments: (1) The order entered was in excess of and contrary to the statutory rate-making procedure required by Article 25, Chapter 58, of the General Statutes of North Carolina and approved by this Court and the Supreme Court of North Carolina, (2) the order is not supported by material and substantial evidence, (3) the order was in violation of the rights of appellants guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution, and the law of the land clause of Article I, Section 19, of the Constitution of North Carolina and in contravention of the provisions of Article I, Section 6, and Article 1 of the Constitution of North Carolina reserving legislative power of the State to the General Assembly; and (4) the order is prejudicial to the substantial rights of the appellants and therefore reversible because it was based upon hearings conducted by the Commissioner of Insurance as a consumer advocate rather than as a governmental adjudicator and independent decision-maker and in an arbitrary and capricious manner denying to appellants due process of law in contravention of the law of the land clause of Article I, Section 19, of the Constitution of North Carolina, and the due process clause of the Fourteenth Amendment to the United States Constitution.

We choose to discuss only one of the arguments. This is not to say that the others are without validity. However, it appears to us that the order is so obviously not supported by material and substantial evidence, that it is unnecessary to discuss the other assignments of error.

Assuming then, for purposes of argument only, that the Commissioner did not exceed his statutory authority as to rate-

making, we look at the entire record to determine whether the order entered was supported by material and substantial evidence. G.S. 58-9.4 provides that "[a]ny order or decision of the Commissioner, *if supported by substantial evidence,* shall be presumed to be correct and proper" (emphasis supplied), and G.S. 58-9.6(b) provides that the court "may affirm or reverse the decision of the Commissioner, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commissioner's findings, inferences, conclusions or decisions are . . . (5) [u]nsupported by material and substantial evidence in view of the entire record as submitted. . . . "

> "Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 95 L.Ed. 456, 71 S.Ct. 456 (1951); *see* Hanft, Some Aspects of Evidence in Adjudications by Administrative Agencies in North Carolina, 49 N.C.L. Rev. 635, 666-68 (1971); 2 Am. Jur. 2d, Administrative Law §§ 621 and 688 (1962). 'Substantial evidence is more than a scintilla or a permissible inference.' *Utilities Commission v. Trucking Company,* 223 N.C. 687, 690, 28 S.E. 2d 201, 203 (1943)." *Comr. of Insurance v. Automobile Rate Office,* 287 N.C. 192, 205, 214 S.E. 2d 98 (1975).

In his order, the Commissioner made 36 findings of fact. In 25 of those findings, the Commissioner expressly stated that they were supported by the testimony of the expert witness Stern, who testified for the Commissioner. Mr. Stern was a member of the staff of the Department of Insurance, State of New Jersey. No actuary on the staff of the North Carolina Department of Insurance testified, and he was the only witness for the Commissioner.

We think that certain excerpts from Mr. Stern's testimony are revealing.

> "MR. STERN: Yes, I have analyzed and studied this filing, Exhibits RO 22 and RO 22-A which are the exhibits in the record of this hearing and constitute the amended filing which you have just handed me and which is the subject of these proceedings. I will proceed to describe the analysis

I have made of the filing and offer as I come to them any exhibits I may have prepared to illustrate my testimony.

I analyzed this filing and realizing that the statute requires that due consideration be given to past and prospective loss experience and expense experience, I prepared several exhibits pertaining to that matter. But we also know that any other factors, relevant factors, must be considered and I believe that one of the most important such other relevant factors is the effect of the present driving conditions of the population in North Carolina and country wide. We have been supplied, all states have been supplied with very valuable information on this subject through the National Association of Insurance Commissioners. One report was submitted to the NAIC in a letter from the Insurance Services Office dated November 15, 1974, and signed by Mr. McNamara, President of ISO."

"MR. STERN: I would like to explain first the genesis of this type of information. When the energy crisis began in October and November, 1973, many commissions including the Commissioner in New Jersey where I work, were concerned about methods by which the effect could be measured on automobile insurance rates because the public wanted to know: 'What are you going to do about it?' And various states started contacting companies and organizations about getting some extra statistics and the NAIC stepped in and told the Commissioners, 'Hold it, we're going to get some real good experts together and they are going to see to it that data are collected in an orderly manner.' And at the December meeting 1973 of the NAIC, the Commissioners were informed that the steps have been taken and the data are going to be collected, and this type of data was explained at that time. Now the data were delivered the—the collection of the data was delivered the—limited to those companies that were able to respond quickly and short of the extra expense. Realizing that they are going to represent such a large sample of the total insurance industry, that the data, that the results could be accepted as being significant, the alternative would have been for every state to issue its own call for experience—cost the companies a great deal of expense—and force every company to report on data which really do not vary from company to company. What was to be measured was the effect of people

not having enough gasoline, having to stand in lines to wait for it for hours and what effect it would have on driving conditions; also, of course, the effect of speed limits, the reduced speed limits.

It is obvious that people didn't line up by company in front of the gas pumps; they didn't have special lines for the sixty-five percent of cars which I included in these data for North Carolina and special lines for people in the other thirty-five percent; they didn't have special enforcement procedures for those people who are insured with the sixty-five percent as opposed to those who are insured with the other thirty-five percent. This is the typical kind of other relevent information which is contemplated by the rate regulatory statute; that is, data other than strictly insurance statistics, other than loss and expense experience. And that is why I made a study of these data to present to you here, today. . . . "

" . . . Now we all were under the impression when we all read these latest releases from the NAIC that the—somebody may call it a trend, has simmered it down and really the third quarter of 1974 has gone back to, somewhat went back to normal. However, we now have an additional piece of information and before I introduce that exhibit, I want to mention this: The NAIC at its last meeting decided to discontinue the collection of these fast track monitoring statistics, probably based on the sentiment I just referred to, that the energy crisis is over. Some states didn't agree and the Commissioner of North Carolina didn't agree and he instructed the two statistical agencies, Insurance Services Office and National Association of Independent Insurers, who are involved in this project, to continue to report to him the data for North Carolina, and such first report was received here with letter from the National Association of Independent Insurers on February 4— the date is February 4, 1975."

" . . . My personal feeling is that a more straightforward method would be to combine claim freqency and claim cost into a quantity which we refer to as a pure premium. Pure premium is simply the average loss cost per car and the loss cost per car depends upon how much you pay on the average per claim and how many claims you have on the average

per car. It is the most straightforward method of measuring really what it costs to insure cars, so I simply took the data shown in the filing for claim cost and claim frequency and I combined them into a pure premium, which is a simple arithmetic calculation of multiplying frequency by claim cost and I would like to offer an exhibit pertaining to bodily injury."

"MR. STERN: To summarize the information we looked at before, we saw substantial decreases in bodily injury frequencies and decreases in property damage pure premiums on Exhibit ID 50. We noted the decrease in loss ratios of the magnitude of, in the neighborhood of five percent for each of the periods of bodily injury and around three percent, four percent for property damage, except for the third quarter of 1974 and that was shown in Exhibit ID 52. And finally we looked at the latest data for the eleven months, comparing eleven months of 1974 compared with the eleven months of 1973, Exhibit ID 53, which indicated a substantial decrease in frequencies in bodily injury of thirteen percent and a property damage pure premium decrease of six percent. There are other relevant factors which affect the cost of insurance, or the occurrence of losses. The reduced—the reduction in the driving and the use of automobiles is not only affected by availability of gasoline, but also by the price of gasoline. Many people have to restrict their driving because of the high cost of gasoline compared with normal times, the years reflected by the accident year experience 1972 and '73, the early part of '73, because the accident year experience ends on June 30, 1973. Another important element that affects the exposure to road hazards is the economic condition of the country, particularly North Carolina. Today's newspaper reports that the unemployment rate in North Carolina is ten point six percent. It must be obvious that people who have to live on unemployment insurance benefits must be restricting many activities and driving should be one of the first ones to restrict. They are troubled by inflation and unemployment, now. It will also affect drinking habits. We know that driving after drinking is one of the very frequent causes of serious injury. Apparently the people are unemployed, they won't go to the bar, they are lucky they can drink their beer at home, which means they won't drive after they have their

beer. And I think prior recessions have shown that, that during a period of recession of reduced activity insurance experience does show an improvement. Now these are qualitative characteristics—we cannot quantify them for you, except for what we have already presented here. I conclude that taking all these factors together, a supplementary rate level reduction factor of five percentage points would be more than justified. And I want to point out this is not a trend factor. Looking at exhibit—

THE COMMISSIONER: Would that be a minus five percent?

MR. STERN: Yes, sir. Looking at Exhibit ID 53, it tells us that the pure premium for property damage liability went down from twenty dollars and forty-six cents in 1973 to nineteen dollars and twenty-six cents. I am not saying that this is a trend that will accumulate from year to year, and if that will present a six percent decrease, it's going to be twelve percent the next year and eighteen percent the next as we do when we use a trend factor, where we multiply the annual increment by the number of years to which you are projecting to. I am simply saying that, let's only assume that the experience will stand still at this point, that the eleven months of 1975 compared to eleven months of 1973 would show the same picture as what we see on Exhibit ID 53 to be true if you compare '74 with '73. I am not suggesting that you can reasonably project into the future—I am only suggesting that we are taking this as the last information we have and base the loss level on this last piece of information.

And again in a qualitative way, I am suggesting that a supplementary factor of minus five percentage points be applied to the rate level calculations. And that means that on bodily injury on Exhibit IB (sic) 56, the minus eighteen point nine would become a minus twenty-three point nine percent. And on Exhibit ID 57-A, the plus seven point one would become a plus two point one. That concludes my observation on this rate filing."

Turning now to the findings of fact, we find:

"6. That the effect of paid claim costs and paid claim frequencies is combined in the average loss cost per car, which is referred to as pure premium, and that a trend adjust-

ment for changes in pure premium is the most straightforward method of measuring the trend in the cost of providing automobile liability insurance, which finding is supported by the testimony of expert witness Stern.

7. That a period of 2.25 years is a reasonable period for computing a pure premium trend factor for the amended filing, which finding is supported by the testimony of expert witness Stern.

8. That bodily injury pure premium for all companies writing private passenger automobile liability insurance in North Carolina for the annual periods ending at the end of each quarter from June 30, 1971, through March 31, 1974, remained basically unchanged, and therefore the bodily injury pure premium trend factor should be unity, which finding is supported by the testimony of expert witness Stern, who concluded, after considering the miniscule annual increase in bodily injury pure premium (most of which resulted from the relatively low starting point in 1971 prior to the relaxing of federal price controls and also prior to the experience period used in this filing), that the appropriate way of reflecting past and prospective bodily injury loss experience in the amended filing is by a trend factor of unity.

9. That property damage pure premium for all companies writing private passenger automobile liability insurance in North Carolina for the annual periods ending at the end of each quarter from June 30, 1971, through March 31, 1974, reflects an annual increase of 4.8% per year, based on an actuarilly acceptable line of best fit method, which finding is supported by the testimony of expert witness Stern.

10. That a bodily injury pure premium trend factor of 1.00 (or unity) provides an adequate bodily injury loss trend adjustment from the amended filing (derived from the finding that such pure premium has remained basically unchanged), which finding is supported by the testimony of expert witness Stern.

11. That a property damage pure premium trend factor of 1.108 provides an adequate property damage loss trend adjustment for the amended filing (derived from the find-

ing of a 4.8% increase per year and a 2.25-year period), which finding is supported by the testimony of expert witness Stern."

"25. That the National Association of Insurance Commissioners 'energy crisis' experience for North Carolina collected under said plan or system represents the private passenger automobile liability insurance loss experience for companies writing approximately 65% of the total premium volume for such insurance in North Carolina and that therefore such experience is significant for rate-making purposes in North Carolina, which finding is supported by the testimony of expert witness Stern.

26. That evidence in the record, including the 'energy crisis' data collected under said plan or system, shows a need for a supplementary reduction in the rate level in addition to those changes set forth above, which finding is supported by the testimony of expert witness Stern.

27. That said 'energy crisis' data reflect the results of the reduction in speed limits, the unavailability of gasoline for some time, and the continued lesser accessibility of gasoline to many because of increased costs, which findings are supported by the testimony of expert witness Stern."

"29. That, taking the latest information available, including the 'energy crisis' data referred to above, along with other relevant factors, such as the rate unemployment in North Carolina, demonstrates the need for a supplementary rate level reduction factor of five (5) percentage points for both bodily injury and property damage rates in addition to those changes set forth above, which reduction is a 'one-step' trend: resulting in a total rate level change indication of a 23.8% reduction in bodily injury rates and a 2.5% increase in property damage rates, which finding is supported by the testimony of expert witness Stern, who reached this conclusion based on all the business done by all companies in North Carolina.

30. That such a further 5% reduction is a conservative reduction which gives full consideration to the partially offsetting effect of inflation, which finding is supported by the testimony of expert witness Stern."

The Commissioner further concluded that "the 'energy crisis' data referred to in the above findings of fact come within the description in this provision of said Article (Article 25, Chapter 58 N.C.G.S.) of what the Commissioner shall give consideration to; and therefore it is concluded that the Commissioner is required by the provisions of said Article to give consideration to the 'energy crisis' data in this record in determining the necessity for an adjustment of rates." He then ordered "that private passenger automobile liability insurance rates for use in North Carolina be decreased by 23.8% for bodily injury and increased by a 2.5% for property damage to be effective on 1 May 1975."

It is obvious that the Commissioner adopted witness Stern's testimony that a supplementary rate level reduction factor of 5 percentage points was necessary for both bodily injury and property damage rates in addition to certain changes he enumerated. It is also obvious that witness Stern based that figure on extremely tenuous theories deriving from his personal evaluation of the results and effect of the "energy crisis" and general economic conditions on North Carolina drivers. Admittedly, the effects on automobile liability insurance costs in North Carolina, if any, of the so-called "energy crisis" and economic conditions are difficult, if not impossible, to quantify. Nevertheless, rates cannot be based upon such speculative statements as contained in the record before us.

In short, in our opinion the order of the Commissioner was not based on material and substantial evidence and must be

Reversed.

Judge PARKER concurs.

Judge MARTIN dissents.

Judge MARTIN dissenting.

On 1 July 1974 the North Carolina Automobile Rate Administrative Office made a filing with the Commissioner of Insurance, pursuant to G.S. 58-248, which proposed statewide average rate level changes and a reduction of 3.7% for bodily injury liability insurance and an increase of 11.4% for property damage liability insurance.

The original filing was based on a calculation of earned premium at the now (and then) existing rate level for fiscal accident years ending June 30, 1972 and June 30, 1973 compared to a calculation of incurred losses (including loss adjustment expense) for the same statistical years but trended to October 1, 1974, for upward trends in average paid claim costs for both bodily injury and property damage claims paid between January 1, 1970 and September 30, 1973.

The original filing was based on further calculations that 27.4% of the premium dollar should be allocated to insurer expenses (other than loss adjustment expenses) based on a special call of insurer expense experience in North Carolina, and that 5% of the premium dollar should be allowed for underwriting profit—thus leaving 67.6% of the premium dollar for the payment of losses and loss adjustment expenses.

On 20 September 1974, the Attorney General intervened in behalf of the using and consuming public of the State of North Carolina.

On 2 January 1975, the Rate Office amended its filing to request 13.3% for bodily injury and a rate level increase of 22.5% for property damage. (The Rate Office had not theretofore employed claim frequency trending which is standard rate making procedure used in many states.) The change in methodology in the amended filing was the use of a trend factor based on a combination of trends in claim frequencies and trends in average paid claim costs, instead of a trend factor based solely on average claim costs, and a trend period ending a year and two months after the filing, instead of a period ending three months after the filing. The combination trend factor utilized by the Rate Office used 16 quarters of year-ended claim frequency experience and 12 quarters of year-ended claim payment experience (both last reported as of the year ended March 31, 1974).

On 25 and 26 November 1974, the Commissioner conducted a public hearing, which was continued to and resumed 10 December 1974 and 6, 7, 15, 21, 22, 23, 24, 27, 28, 29 January 1975 and 4, 7, February 1975 and 10 March 1975.

The hearings on the original and amended filings concluded on March 17, 1975. Much, if not most, of the testimony in the record deals with: (1) details of the present statistical plan

whereby insurers report "underwriting experience" to the three statistical agents: Insurance Services Office, the National Association of Independent Insurers, and the National Independent Statistical Service and the same is combined by Insurance Services Office under the supervision of the Rate Office to make the filings pursuant to G.S. 58-248; (2) the Commissioner's dissatisfaction with the present statistical plan and Insurance Services Office's execution of the plan; (3) the feasibility of amending the plan to secure more detail and more current information; and (4) detailed explanation of the methodology and statistics that Insurance Services Office and the Rate Office use in arriving at the calculations contained in the rate-making formula.

The Rate Office presented the testimony of three witnesses in support of the indicated rate adjustment requested in the amended filing (and in opposition to the testimony of Phillip K. Stern, hereinafter referred to): Paul L. Mize, manager of the Rate Office; John J. Kollar, an assistant actuary with Insurance Services Office; and John H. Muetterties, a vice president and actuary with Insurance Services Office. The Rate Office also offered the testimony of John H. Jeffries, a motor vehicle damage appraiser, to corroborate certain information in the filing dealing with trends in auto repair costs in this State and other witnesses who testified with respect to the present statistical plan and proposed amendments thereto.

The Insurance Department staff presented the testimony of Phillip K. Stern, an actuary with the New Jersey Department of Insurance. Stern based his opinions on: (1) information contained in the amended filing; (2) additional information furnished by the Private Passenger Automobile Accelerated Monitoring (Statistical) System operated under the auspices of the National Association of Insurance Commissioners (which contained certain statistical details for private passenger automobile liability experience in North Carolina with respect to 65% of the business written therein up to and including November of 1974); and (3) general economic conditions.

The majority opinion is that the order of the Commission be reversed rather than modified or remanded for further proceedings. Thus, its effect is a denial of all rates authorized by the Commissioner and the dismissal of the proceedings.

The majority state they looked at the entire record and in their opinion the order was not supported by material and substantial evidence, that being the only question they chose to discuss in reaching their conclusion. The record and briefs raise several other important questions which were not answered.

The standards of "substantial evidence" is widely used in judicial review of administrative decisions. It has been defined by the North Carolina Supreme Court as "more than a scintilla or a permissible inference." *Utilities Commission v. Trucking Co.*, 223 N.C. 687, 690, 28 S.E. 2d 201, 203. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938). "[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *N.L.R.B. v. Columbian Enameling and Stamping Co.*, 306 U.S. 292, 300 (1939). See generally, Davis, Administrative Law Treatise, §§ 29.01-29.06, pp. 114-149. The correctness and propriety of the Commissioner's order and decision must be judged by this substantial evidence standard. G.S. 58-9.4.

The statuory method for judicial review of decision by the Commissioner of Insurance concerning insurance rates is set out in G.S. 58-9.4 through 58-9.6.

The majority call attention that the Commissioner made 36 findings of fact and in 25 of those findings he expressly stated that they were supported by the testimony of expert witness Stern, who testified for the Commissioner. The majority opinion then recited certain excerpts from Stern's testimony followed by a summary of 11 of the findings of fact. No further mention is made of the 25 additional findings of fact. No further evidence was recited or discussed.

Those additional findings of fact not recorded in the majority opinion, together with the Commissioner's conclusions and order, are as follows:

FINDINGS OF FACT

1. That the present rates for private passenger automobile insurance in North Carolina were established by orders of the former Commissioner of Insurance dated May 26, 1972, and December 4, 1972, with those rates becoming effective October 10, 1973.

2. That pursuant to G.S. 58-248 the North Carolina Automobile Rate Administrative Office (hereinafter called the Rate Office) on July 1, 1974, made its annual private passenger automobile liability insurance rate filing using statistics based on limits of $10,000 each person and $20,000 each accident for bodily injury and $5,000 each accident for property damage (hereinafter called basic limits), which filing did not contain claim frequency statistics.

3. On January 2, 1975, subsequent to a directive by the Department to revise certain parts of the filing to include claim frequency statistics, said filing was amended by the Rate Office, with the amended filing using statistics, including claim frequency statistics, based on basic limits.

4. That there are two modifications to the automobile liability insurance rate-making procedure heretofore used in North Carolina that should be implemented, to wit: (1) a trend adjustment for changes in claim frequencies, which is included in a trend adjustment for changes in pure premium as set out in the findings of fact numbered 5 through 11 below and (2) an allowance for unallocated loss adjustment expenses independent of loss development and loss trends as set out in the findings of fact numbered 12 through 15 below, which finding is supported by the testimony of expert witness Stern.

5. That around 1968 states other than North Carolina began including a trend adjustment for claim frequencies as part of the automobile liability insurance rate-making procedure, but that the Rate Office did not utilize a trend adjustment for claim frequencies until the 1975 amendment to the filing under consideration (which was made following the directive by the Department to amend certain parts of the filing to include claim frequency statistics) and that the failure to consider changes in claim frequencies in arriving at the present rates resulted in a "cushion," i.e., an excessiveness, in the present rates, which finding is supported by the testimony of expert witness Stern.

* * *

12. That the factor applied to the combination of losses and allocated loss adjustment expenses to allow for unallocated loss adjustment expenses has over the years gone down, which means that the unallocated loss adjust-

ment expenses did not rise at the same rate as the losses, and that including said factor in the losses before applying loss development and loss trend adjustments, as heretofore has been done in North Carolina, has resulted in an excessive allowance for loss adjustment expenses and has produced a "cushion," i.e., an excessiveness, in the present rates, which finding is supported by the testimony of expert witness Stern.

13. That the proper way of treating unallocated loss adjustment expenses in the rate-making formula is to make an allowance for such expenses as an expense item with a trend adjustment for the effect of inflation on such expenses, instead of applying loss development or loss trend adjustments to such expenses (as heretofore has been done in North Carolina), and that the "cushion" in the premium rates referred to in the preceding finding of fact would be adequate to absorb an inflationary trend in such expenses for the amended filing, which finding is supported by the testimony of expert witness Stern.

14. That adequate allowances for unallocated loss adjustment expenses for bodily injury for the amended filing (based on the Rate Office computed factor of 1.101 applied to the undeveloped combination of incurred losses and allocated loss adjustment expenses before loss trend adjustment) are $5,908,877 for accident year ending June 30, 1972, and $6,063,323 for accident year ending June 30, 1973, which finding is supported by the testimony of expert witness Stern.

15. That adequate allowances for unallocated loss adjustment expenses for property damage for the amended filling (based on the Rate Office computed factor of 1.113 applied to the undeveloped combination of incurred losses and allocated loss adjustment expenses before loss trend adjustment) are $5,486,221 for accident year ending June 30, 1972, and $6,143,337 for accident year ending June 30, 1973, which finding is supported by the testimony of expert witness Stern.

16. That the rate changes proposed by the Rate Office are based on a rate-making formula containing an allowance of 5% of earned premium for underwriting profit and contingencies.

17. That the annual return from the investment of unearned premium reserves and loss reserves for all private passenger automobile liability insurance in North Carolina is 2.3% of earned premium, based on the latest available statistics.

18. That an underwriting profit of 2.7% of earned premium provides for a fair and reasonable underwriting profit within the meaning of G.S. 58-248, which finding is supported by the testimony of expert witness Stern.

19. That adding said 2.3% return to said 2.7% allowance for underwriting profit to arrive at a 5% of earned premium allowance for overall profit and contingencies is an equitable manner of including the amount of earnings from the investment of unearned premium reserves and loss reserves in the rate-making formula, which finding is supported by the testimony of expert witness Stern, and which procedure was set forth and followed in the last order (by the former Commissioner) effecting private passenger automobile liability insurance rate changes, which order was affirmed by the North Carolina Court of Appeals. 18 N.C. App. 23, 195 S.E. 2d 572 (1973), *cert. denied,* 283 N.C. 585 (1973).

20. That all of the factors, allowances, and adjustments supplied by expert witness Stern are reasonable, proper and correct.

21. That all of the factors, allowances, and adjustments set forth and used in the amended filing as modified and replaced by expert witness Stern, are reasonable, proper, and correct.

22. That based on the statistics supplied by the Rate Office in the filing; the factors, allowances, and adjustments supplied by the Rate Office in the filing as modified and replaced by the factors, allowances, and adjustments supplied by expert witness Stern; Exhibit ID-56A as testified to by expert witness Stern; and before the consideration of other relevant data as set forth in findings of fact numbered 24 through 30 below; the indicated rate level change for bodily injury coverage is a reduction of 18.8%, which finding is supported by the testimony of expert wit-

ness Stern and which is shown by the following computations:

		Accident Year Ended June 30 1972	1973
(1)	Earned premium at present rates for $10,000/$20,000 limits	$111,796,082	$121,823,542
(2)	Incurred losses including all loss adjustment expenses, developed	$ 64,992,327	$ 68,409,595
(3)	Loss development factor	1.009	1.035
(4)	Incurred losses including all loss adjustment expenses, undeveloped (2) + (3)	$ 64,412,613	$ 66,096,227
(5)	Unallocated loss adjustment expenses factor	1.101	1.101
(6)	Unallocated loss adjustment expenses (4) — [(4) + (5)]	$ 5,908,877	$ 6,063,323
(7)	Incurred losses including allocated loss adjustment expenses, developed [(4) — (6)] × (3)	$ 59,030,270	$ 62,134,056
(8)	Trend		
	(a) Annual percent change in pure premium	0.0%	0.0%
	(b) Number of years from midpoint of experience period to 4/1/75	Not applicable because (a) is 0.0%	
	(c) Trend factor 1.0 + (8b) × (8a)	1.00	1.00

(9)	Losses including allocated loss adjustment expenses, developed, and reflecting trend (7) × (8c)	$ 59,030,270	$ 62,134,056
(10)	Losses including all loss adjustment expenses, developed, and reflecting trend (9) + (6)	$ 64,939,147	$ 68,197,379
(11)	Loss ratio (10) ÷ (1)	.581	.560
(12)	Accident year credibility	.50	.50
(13)	Credibility weighted loss ratio	.570	
(14)	Expected loss ratio	.702	
(15)	Indicated rate level change [(13) ÷ (14)] — 1.00	—18.8%	

23. That based on the statistics supplied by the Rate Office in the filing; the factors, allowances, and adjustments supplied by the Rate Office in the filing as modified and replaced by the factors, allowances, and adjustments supplied by expert witness Stern; Exhibit ID-57B as testified to by expert witness Stern; and before the consideration of other relevant data as set forth in findings of fact numbered 24 through 30 below; the indicated rate level change for property damage coverage is an increase of 7.5%, which finding is supported by the testimony of expert witness Stern and which is shown by the following computations:

		Accident Year Ended June 30 1972	1973
(1)	Earned premium at present rates for $5,000 limit	$ 78,055,751	$ 85,057,076
(2)	Incurred losses including all loss adjustment expenses, developed	$ 53,982,813	$ 60,630,169

(3)	Loss development factor	.999	1.002
(4)	Incurred losses including all loss adjustment expenses, undeveloped (2) + (3)	$ 54,036,850	$ 60,509,151
(5)	Unallocated loss adjustment expenses factor	1.113	1.113
(6)	Unallocated loss adjustment expenses (4) — [(4) ÷ (5)]	$ 5,486,221	$ 6,143,337
(7)	Incurred losses including allocated loss adjustment expenses developed [(4) — (6)] × (3)	$ 48,502,078	$ 54,474,545
(8)	Trend		
	(a) Annual change in pure premium	+.048	+.048
	(b) Number of years from midpoint of experience period to 4/1/75	2.25	1.25
	(c) Trend factor 1.0 + (8b) × (8a)	1.108	1.060
(9)	Losses including allocated loss adjustment expenses, developed and reflecting trend (7) × (8c)	$ 53,740,302	$ 57,743,018
(10)	Losses including all loss adjustment expenses, developed, and reflecting trend (9) + (6)	$ 59,226,523	$ 63,886,355
(11)	Loss ratio (10) ÷ (1)	.759	.751
(12)	Accident year credibility	.50	.50
(13)	Credibility weighted loss ratio	.755	

(14)	Expected loss ratio	.702
(15)	Indicated rate level change [(13) ÷ (14)] — 1.00	+7.5%

24. That beginning in 1973 the National Association of Insurance Commissioners implemented a plan known as the Accelerated Monitoring System or as the Fast Track Monitoring System to collect data on a state by state basis from a large segment of the private passenger automobile insurance industry for the purpose of measuring the continuing impact of the "energy crisis" on private passenger automobile insurance losses.

* * *

28. That from the testimony of expert witness Stern and of Rate Office expert witness Muetterties, the "energy crisis" data referred to above in findings of fact numbered 24 through 27 is supplementary data that should be considered by an actuary testifying in this rate case, which testimony supports this finding.

* * *

31. That applying to basic limits coverage the rate changes of a 23.8% reduction in bodily injury rates and a 2.5% increase in property damage rates using Exhibit ID-58A as testified to by expert witness Stern, the following specific findings are made:

A. The earned premiums to be anticipated by all companies operating in North Carolina considered as one company in the near future, i.e., for the year ending April 1, 1976 from writing private passenger automobile liability insurance, using the rates resulting from said 23.8% reduction in bodily injury rates and said 2.5% increase in property damage rates, are $104,032,478 for bodily injury and $97,716,518 for property damage for a total of $201,748,996, and

B. The reasonably anticipated loss experience during the life of said policies for said year will be $73,030,800 for bodily injury and $68,596,996 for property damage for a total of $141,627,796, and

C. The reasonably anticipated operating expenses in said period will be $28,192,802 for bodily injury and

$26,481,176 for property damage for a total of $54,673,978, and

D. The percent of earned premiums which will constitute a fair and reasonable underwriting profit for all of the insurance companies engaged in writing private passenger automobile liability insurance in that period in this State is 5%, reduced to 2.7% by consideration of the earnings of all companies writing automobile liability insurance in this State from the investment of unearned premium reserves and the investment income from loss reserves, totaling 2.3%, and

E. The underwriting profit which can be reasonably anticipated for all companies writing private passenger automobile liability insurance in North Carolina, using the rate level resulting from said 23.8% reduction in bodily injury rates and said 2.5% increase in property damage rates is $2,808,876 for bodily injury and $2,638,346 for property damage for a total of $5,447,222, on an anticipated volume of bodily injury earned premiums of $104,032,478 and of property damage earned premiums of $97,716,518 for a total of $201,748,996 which produces a 2.7% of earned premium underwriting profit before federal income taxes. Said 2.7% of earned premium provides for a fair and reasonable underwriting profit within the meaning of G.S. 58-248 and constitutes a fair and reasonable profit for all companies writing automobile liability insurance in this State for said period,

which findings are supported by the testimony of expert witness Stern.

32. That the above finding is based on proposed average rate (for basic limits) of $37.39 for bodily injury and $35.12 for property damage as shown by the following computations:

	B.I.	P.D.	Total
Present average rates	$ 49.07	$ 34.26	$ 83.33
Proposed average rates (—23.8% BI; + 2.5% PD)	37.39	35.12	72.51

(1) Earned premiums to be anticipated at proposed rates	$104,032,478	$ 97,716,518	$201,748,996
(2) Anticipated loss experience (incurred losses and loss adjustment expenses)	$ 73,030,800	$ 68,596,996	$141,627,796
(3) Anticipated operation (underwriting expenses applicable)	$ 28,192,802	$ 26,481,176	$ 54,673,978
(4) Anticipated combined losses and expenses (line 2 + line 3)	$101,223,602	$ 95,078,172	$196,301,774
(5) Anticipated underwriting profit before Federal income taxes (line 1 — line 4)	$ 2,808,876 (2.7%)	$ 2,638,346 (2.7%)	$ 5,447,222 (2.7%)

33. That the mathematical computations in Exhibits ID-56A, ID-57B, ID-58A were verified and found to be mathematically correct.

34. That adjustments in private passenger automobile liability insurance rates consisting of a reduction of 23.8% for bodily injury and an increase of 2.5% for property damage will produce premium rates for the future which will provide for anticipated loss and loss adjustment expenses, anticipated expenses attributable to the selling and servicing of the line of insurance involved and will provide for a fair and reasonable underwriting profit, which finding is supported by the testimony of expert witness Stern.

35. That said premium rate adjustments are warranted and will produce rates that are reasonable, adequate, not unfairly discriminatory and in the public interest.

36. That said 23.8% bodily injury rate reduction and said 2.5% property damage rate increase results in an overall private passenger automobile liability insurance

rate reduction for 10/20/5 policy limits (the limits on which the amended filing was based) of 13%.

CONCLUSIONS OF LAW

1. Under the provisions of Article 25 of Chapter 58 of the General Statutes of North Carolina, the Rate Office is required to submit to the Commissioner of Insurance annual rate proposals for bodily injury and property damage insurance on private passenger vehicles on or before July 1 of each calendar year.

2. Under the provisions of said Article, the Commissioner of Insurance must exercise his authority so as to produce rates which are reasonable, adequate, not unfairly discriminatory, and in the public interest, and it is concluded that the bodily injury rate reduction of 23.8% and the property damage rate increase of 2.5% will produce rates which meet these standards.

3. Under the provisions of said Article, proposed rates shall not be deemed unreasonable, inadequate, unfairly discriminatory or not in the public interest, if such proposed rates make adequate provisions for premium rates for the future which will provide for anticipated loss and loss adjustment expenses, anticipated expenses attributable to the selling and servicing of the line of insurance involved and a provision for a fair and reasonable underwriting profit, and it is concluded that the bodily injury rate reduction of 23.8% and the property damage rate increase of 2.5% will produce rates which make adequate provisions for all these items, including a provision for a fair and reasonable underwriting profit.

4. Under the provisions of said Article, the Commissioner of Insurance may take into consideration in the exercise of his rate authority the earnings of all companies writing automobile liability insurance in this State realized from the investment of unearned premium reserves and investments from loss reserves on policies written in this State by including the amount of such earnings in an equitable manner in the rate-making formula to arrive at a fair and equitable rate, and it is concluded that including such earnings expressed as a percentage of earned premiums in the profit and contingencies allowance (also expressed as a

percentage of earned premium) in the rate-making formula is a procedure whereby the amount of such earnings is included in an equitable manner in the rate-making formula to arrive at a fair and equitable rate.

5. Said Article provides that in determining the necessity for an adjustment of rates the Commissioner shall give consideration to past and prospective loss experience, including the loss trend and other relevant factors developed from the latest statistical data available; to such relevant economic data from reliable indexes which demonstrate the trend of costs relating to the line of automobile insurance for which rates are being considered and to such other reasonable and related factors as are relevant to the inquiry; and the "energy crisis" data referred to in the above Findings of Fact come within the description in this provision of said Article of what the Commissioner shall give consideration to; and therefore, it is concluded that the Commissioner is required by the provisions of said Article to give consideration to the "energy crisis" data in this record in determining the necessity for an adjustment of rates.

NOW THEREFORE, IT IS HEREBY ORDERED:

That private passenger automobile liability insurance rates for use in North Carolina in the future be decreased by 23.8% for bodily injury and increased by a 2.5% for property damage to be effective on May 1, 1975.

The order was based on the testimony of witness Stern. Without objection Stern was qualified as an expert witness and actuary in automobile insurance rate making. He testfied as follows:

"I started as a trainee with the Mutual Insurance Rating Bureau in 1946. I was appointed Assistant Actuary in 1949 and Actuary in 1957. I stayed with the Mutual Bureau until March of 1966 and then assumed the position of Actuary with the National Bureau of Casualty Underwriters, which is one of the predecessor organizations of ISO. I stayed with ISO until March, 1970, at which time I entered into the acturial consulting field, but I only stayed with that for about nine months and I then assumed my present position. I have testified in hearings as an expert witness involving

automobile liability insurance rates previously. I have done that extensively.

Describing the nature and extent of the work that I do in preparing for such testimony, part of that work, of course, involves the verification of underlying data which I used, the examination of rate-making techniques as to their reasonableness in achieving the objectives of the statute to have rates that meet the standards I just referred to. It involves making calculations where I find that the filing procedures do not meet the standards of our statutes.

I have been qualified in these various hearings in which I have testified as an expert in the field of automobile liability insurance rate making. I am a graduate of the University of Vienna Law School; I studied social insurance at the Graduate Faculty of the New School for Social Research in New York; I am a member of the American Academy of Actuaries and I am an Associate of the Casualty Actuarial Society.

During my career I have written papers, given lectures or taught courses involving subject matter related to the field of automobile liability insurance rate making. I constantly write on matters of insurance in relation to my daily work and advising legislative bodies in rating matters. I have written a paper pertaining to rate-making procedures for automobile insurance, which is on the—published by the Casualty Actuarial Society and it is one of their recommended readings for students of the Society.

I have been active in NAIC—that's the National Association of Insurance Commissioners—activities in regard to automobile liability insurance rate making. I was involved in several task forces, one pertaining to profitability, which, of course, profit, of course, is the true test of rate adequacy or excessiveness. I am presently involved in a task force that will take a new look at the method of determining classification differentials for private passenger cars. And I only recently worked with the staff of the NAIC on a program on improving the statistics for private passenger insurance. This latest report will probably be considered by the Executive Committee of the NAIC later on this month."

The most important item of documentary evidence on which Stern based his opinion was the Rate Office amended filing of January 2, 1975. The other documentary evidence was the fast track data (ID Exhibit No. 11, ID Exhibit 15, ID Exhibit No. 22, ID Exhibit No. 49, and ID Exhibit Nos. 50, 51, 52 and 53). Also considered were ID Exhibits 17 and 17A which were prepared by the Rate Office or by ISO at the Rate Office's direction concerned with investment income from unearned premium and loss reserves. Time and space will not permit reproduction of the exhibits in this opinion.

Except with respect to underwriting profit and the supplemental rate level reduction factor, the difference between the result indicated by the amended filing and the result reached by the witness Stern are due to the extent and method of trending past loss experience to a date in the future and the data on which those results were reached.

The Rate Office witnesses testified in support of a trending method which used an annual trend factor combining claim frequency with average paid claim costs and which trended losses to March 1, 1976. Twelve year-ended quarters of average paid claim costs experience and sixteen year-ended quarters of claim frequency experience were employed. Obviously, the data on which the trending was based and the method employed by the Rate Office gives minimal effect to experience after September of 1973 for several reasons:

(1) The number of points selected to compose the trend line prior to October of 1973, in one instance: ten, and in the other: fourteen, dampen the effect of the two points of experience which were used after September of 1973.

(2) The use of a year's experience to constitute points on a trend line dampens the effect of experience during only part of that year.

In contrast to the method employed by the Rate Office, Stern adopted the following trending procedures:

(1) Instead of using a combination trend factor, Stern (using data supplied by the Rate Office in the amended filing) trended pure premium per car (or average loss per car insured) which is the most straight-forward method of measuring what it costs to insure cars. ID Exhibit No. 54 shows the result of this trending process with respect to bodily injury liability

losses per car insured for the period between June 30, 1970 and March 31, 1974. The witness concluded that no trend for bodily injury losses was shown in the Rate Office data. ID Exhibit No. 55 shows the result of this trending process with respect to property damage liability losses per car insured for the same period and shows an annual percentage increase of 4.8% in the average loss cost per car.

(2) In view of the fact that the fast track data indicated that there was a drop in the pure premium for property damage losses of six percent with respect to the 11/12's year ended November 1974 as compared to the 11/12's year ended November 1973 (ID Exhibit 53) which was contrary to the indications of the Rate Office data (which showed according to Stern's calculations a 4.8% annual increase based on 12 quarters of year ended experience through March 31, 1974) Stern concluded that one year during the trending period with respect to property damage liability losses should be carried at unity or "no trend." In regard to bodily injury losses Stern had already established a trend of unity or "no trend" so that the trend period was immaterial.

(3) Stern also concluded that the trend period should end at April 1, 1975 rather than March 1, 1976, the trend termination date selected by the Rate Office, in view of the contrary indications of the Rate Office data and the fast track data.

(4) With respect to trending unallocated loss adjustment expense, Stern testified that in view of the fact that experience had shown that such expenses had not followed the rise in losses, and in view of the fact that unallocated expense factors had decreased over the years, it would be improper to apply an upward trend to this item of expense.

In addition to the rate reduction indicated by this witness' revision of the trending procedures used in the Rate Office's amended rate making formula, Stern testified that a supplementary rate reduction of 5% was proper based on: (1) the indications of the fast track data; (2) the increased cost of gasoline; (3) the current rate of unemployment in this State; and (4) the reduction in speed limits. Stern was careful to point out that the 5% reduction was not to be magnified by future trending but was a *one time* adjustment.

Stern further testified that there was a cushion or excessiveness in the present rates due to the lack of frequency trending

in past Rate Office filings and a small excess in the underwriting profit allowance. With respect to the credibility of the Rate Office amended filing, Stern testified that the trending method employed by the Rate Office often understates the effect of a frequency downward trend and in the present case the Rate Office's use of a 3% upward trend factor for bodily injury losses "grossly overstates the future loss levels."

With respect to the validity of the fast track sample, Stern testified that he saw no possibility that data not reported under fast track would show a different experience.

With respect to appellants' contentions that Stern's testimony and the Commissioner's order take no account of inflationary trends, ID Exhibit 53 (which shows a 6 percent decline in the property damages losses per car insured for the 11-month period ending November 1974 as compared with a similar period in 1973) indicates that the *decline in frequency* has had more effect than inflation.

Stern's conclusions seem justified from the experience supplied by the Rate Office and by "other relevant factors developed from the latest statistical data available" within the meaning of G.S. 58-248. This was material and substantial evidence.

The conclusion reached in the majority opinion is based upon and limited to a restricted part of the testimony of expert witness Stern. This testimony supported the 11 findings of fact set forth in the majority opinion and was primarily concerned with economic data. Thus, it is necessary to consider whether the Commissioner is limited to the use of insurance statistics—the expense, premium and loss experience of the insurance companies—in the automobile liability insurance rate making process. Appellants contend that the appellate courts have approved this process, citing cases. This is so, but I fail to find that the courts have rejected the use of "other data" which may be relevant to the rate making process.

"It is not a proper ground for the rejection of such evidence that such projection of an upward or downward cost trend into the future has never before been used in the rate making process. *In re Filing by Fire Insurance Rating Bureau,* 275 N.C. 15, 36, 165 S.E. 2d 207, 222 (1969).

G.S. 58-248 provides, inter alia, "In determining the necessity for an adjustment of rates the Commissioner shall give

consideration to past and prospective loss experience, including the loss-trend and other relevant factors developed from the latest statistical data available; to such relevant *economic data* from reliable indexes which demonstrate the trend of costs relating to the line of automobile insurance for which rates are being considered and to such *other reasonable and related factors* as are relevant to the inquiry. . . . "

The language of the statute is broad enough to include evidence, if otherwise competent, received not only through the Rate Office but from other sources as well. *Commissioner of Insurance v. Automobile Rate Office,* 287 N.C. 192, 203, 214 S.E. 2d 98 (1975).

In essence, the statute provides that while insurance company experience is an appropriate element in automobile liability insurance rate making, other data may be relevant to rate making and should be given due consideration.

The fast track information was volunteered by industry to provide some weight as to what effect, if any, the energy crisis might have. Rate Office witness Kollar considered fast track data valid statistics. John H. Muetterties, another witness for the Rate Office, stated that the fast track data contained relevant information that should be considered in the rate making hearing. Witness Stern explained the background of the fast track data and said that it was relevant information for rate making. The data represented 65 percent of the cars insured in North Carolina and showed the following: First eleven months of 1973 compared to first eleven months of 1974: Frequency of bodily injury claims: down 13%; Actual cost in property damage claims per car insured: down 6%. In contrast, the latest information provided by the Rate Office filing was a report on claim frequencies and average paid claim costs as of the year ending *31 March 1974.*

The Commissioner is free to hear all evidence of any type having reasonable probative value, including any evidence of the type upon which responsible persons are accustomed to rely in the conduct of insurance affairs. *In re Filing by the Automobile Rate Office,* 278 N.C. 302, 318, 180 S.E. 2d at 166 (1971). Thus, the testimony of Stern, along with the exhibits presented at the Commissioner's hearing, was relevant and its credibility and weight was to be determined by the Commissioner.

Appellants further contend that the Commissioner acted in excess of and contrary to the statutory rate making process by converting the 1974 Filing into a rate reduction hearing rather than a statutory hearing under G.S. 58-248 wherein he was required to approve or disapprove the 1 July 1974 Filing by the Rate Office. This brings into direct focus the applicability of both G.S. 58-248 and G.S. 58-248.1 in the present proceeding. This presents another interesting question raised by the record and briefs which was not addressed by the majority opinion.

The authority of the Commission is not limited under G.S. 58-248 to approve or disapprove all or any part of any change between the existing rate level and the proposed rate level. This would work an impasse. There is nothing in the statutes that require the Commissioner to accept the rate or rates proposed, or to reject them altogether. See *Utilities Commission v. Telephone Co.*, 263 N.C. 702, 140 S.E. 2d 319. The Rate Office filing proposed new rates—not just a change in the rates. This is not an interim rate hearing. The Rate Office was the petitioner in the proceeding and requested an increase in the rate level. But the Attorney General also intervened and filed a motion on behalf of the consuming public. He moved that the results of the accelerated (statistical) monetary system being developed by the National Association of Insurance Commissioners' Task Force, fast track information, be available to the parties and that the effect of the "energy crisis" be taken into account as fully as possible in any order of the Commissioner resulting from these proceedings. Thus, the provisions of G.S. 58-248.1 became applicable.

Another important question, raised by the record and briefs but not discussed nor decided in the majority opinion, concerns what constitutes a fair and reasonable profit. In examining the propriety of allowing 5% for underwriting profit there is no evidence to show that the amount proposed by the Rate Office is a fair and reasonable profit. It is not a question of law, nor is it a question upon which the determination of the Rate Office is conclusive. It is a question of fact to be determined by the Commissioner upon evidence. The burden of proof is upon the Rate Office to show that the existing premium rates are not sufficient. There is nothing sacrosanct about 5% in connection with what is fair and reasonable profit. Whether five cents out of each dollar of gross revenue, i.e., Earned

Premiums, is a fair and reasonable profit, an excessive profit or an insufficient profit must be determined by the Commissioner from evidence and this, too, involves a projection into the future of past experience and present conditions. It involves consideration of profits accepted by the investment market as reasonable in business ventures of comparable risk. See *In re Filing by Fire Insurance Rating Bureau, supra.*

Appellants argue that for the first time the question is squarely presented to the court as to the propriety of the Commission in deducting from the rate increase proposed by the Rate Office a percentage figure to take into consideration directly prior investment earnings. This question was likewise left unanswered by the majority opinion.

Appellants contend that investment earnings can only be considered in arriving at a formula to be used to determine what is a "fair and reasonable underwriting profit."

G.S. 58-248 provides, inter alia, "The Commissioner of Insurance in considering any rate compiled and promulgated by the bureau may take into consideration the earnings of all companies writing automobile liability insurance in this State realized from the investment of unearned premium reserves and investments from loss reserves on policies written in this State. The amount of earnings may in an equitable manner be included in the rate-making formula to arrive at a fair and equitable rate." Thus, it appears that the General Assembly authorized the Commissioner, not the insurance industry, to consider investment earnings for rate making purposes rather than a formula to determine profit. The statute authorized the Commissioner to determine what was a reasonable profit and the burden of proof was on the Rate Office to justify the proposed amount. They failed to prove a profit of 5% was justified. On the contrary, expert witness Stern testified: "It is my opinion under the circumstances in this case and after reviewing the filing that the 2.7 percent for underwriting profit and contingencies would be just and reasonable."

In the application of the "substantial evidence standard," courts will generally defer to the expertise of the administrator in his specialized field if there is reasonable evidence to support his decision. The law imposes on the Commissioner of Insurance, not us, the duty to approve rates.

The court has a supervisory function of review of agency decisions. This includes examining the evidence and fact findings to see both that the evidentiary fact findings are supported by the record and that they provide a rational basis for inferences of ultimate fact. The entire process combines judicial supervision with a statutory principle of judicial restraint.

The testimony of expert witness Stern, together with the exhibits presented, provided more than a scintilla of evidence supporting the Commissioner's order. The evidence measured up to the standard required as legal support for the Commissioner's findings. The conclusions followed. The two support the rate level authorized.

In my opinion the decision and order of the Commissioner of Insurance that private passenger automobile liability insurance rates for use in North Carolina in the future be decreased by 23.8% for bodily injury and increased by 2.5% for property damage, effective 1 May 1975, should be affirmed.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND DUKE POWER COMPANY, APPLICANT v. RUFUS L. EDMISTEN, ATTORNEY GENERAL

No. 7610UC209

(Filed 18 August 1976)

Utilities Commission § 6— fuel clause — no fixing of rates

G.S. 62-136(a) authorizing the fixing of rates "to be *thereafter* observed and in force" refers to rate fixing as envisioned by G.S. 62-133 and not to the approval of a fuel clause designed to recover previously incurred costs; therefore, the Utilities Commission did not exceed its authority in entering an order allowing a power company to apply a temporary surcharge to recover its increased fuel costs incurred during two previous months while a prior fuel clause was in effect but not yet collected from its customers when such fuel clause was terminated by G.S. 62-134(e).

Judge MARTIN dissenting.

APPEAL by the Attorney General of North Carolina, on behalf of the Using and Consuming Public and State Agencies, from orders of the North Carolina Utilities Commission entered 27 August 1975 and 4 December 1975. Heard in the Court of Appeals 15 June 1976.

The order appealed from authorized Duke Power Company (Duke), on bills rendered on and after 1 September 1975, (1) to adjust its basic retail electric rates by the addition thereof of 0.4181 cent per kilowatt hour (KWH) based solely on increased fuel costs pursuant to G.S. 62-134(e); and (2) to apply a temporary surcharge, spread over a twelve months' period, designed to recover the unbilled revenues accrued as of 31 August 1975 as a result "of the lag in the old fuel adjustment clause on its North Carolina retail jurisdictional service." Proceedings leading up to entry of the order included the following:

On 29 June 1975 Duke filed an application with the Utilities Commission (Commission) pursuant to G.S. 62-134(e), material allegations of the application being summarized except where quoted as follows (numbering ours):

(1) By order issued 10 October 1974 in Docket No. E-7, Sub. 161, the Commission approved the inclusion of a fossil fuel adjustment clause (fuel clause) in all of Duke's North Carolina retail rate schedules. Under said fuel clause the monthly charges in Duke's fossil fuel costs are reflected in its rates and charges to North Carolina retail customers in accordance with the formula set forth in the fuel clause.

(2) On 9 May 1975 the General Assembly enacted Chapter 243 of the 1975 Session Laws which, among other things, added a new subsection (e) to G.S. 62-134 as follows:

> "(e) Notwithstanding the provisions of this Article, upon application by any public utility for permission and authority to increase its rates and charges based solely upon the increased cost of fuel used in the generation or production of electric power, the commission shall suspend such proposed increase for a period not to exceed 90 days beyond the date of filing of such application to increase rates. Upon motion of the commission or application of any person having an interest in said rate, the commission shall set for hearing any request for decrease in rates or charges based solely upon a decrease in the cost of fuel. The commission shall promptly investigate applications filed pursuant to provisions of this subsection and shall hold a public hearing within 30 days of the date of the filing of the application to consider such application, and shall base its order upon the record adduced at the hearing, such record to include all pertinent information available

to the commission at the time of hearing. The order responsive to an application shall be issued promptly by the commission but in no event later than 90 days from the date of filing of such application. A proceeding under this subsection shall not be considered a general rate case. All monthly fuel adjustment rate increases based solely upon the increased cost of fuel, as to each public utility, as presently approved by the commission shall fully terminate effective September 1, 1975, except that the same shall be earlier terminated as to each such public utility upon the effective date of any final order of the commission under this section; provided, however, that the termination date of September 1, 1975, shall not apply to any public utility which has filed an application under this subsection on or before July 1, 1975, and where the commission has not issued a final order by September 1, 1975. . . . "

(3) The purpose of this application is to accommodate Duke's rates and charges for North Carolina retail service, and rate schedules reflecting the same, to the change of law effected by G.S. 62-134(e).

(4) "Duke's present fuel clause contains a base of .5035 cent per KWH, which was derived from its fossil fuel cost in the month of October, 1973. This base of .5035 cent per KWH of generation is presently reflected in Duke's basic rates and charges for its retail customers in North Carolina. Since October of 1973, the fossil fuel costs of Duke have increased dramatically. Duke's fossil fuel cost for the month of May, 1975, was 1.1683 cent per KWH generated. Duke respectfully shows it cannot possible (sic) absorb the differential in the current cost of fossil fuel over and above the cost of .5035 cent per KWH reflected in its basic rates and charges. In order for Duke to continue to discharge its public utility obligation, it is necessary that it continue to recover these increased costs on a timely basis. Since G.S. 62-134(e) provides for the termination of the fuel clause, it is essential that Duke's basic rate schedules be changed to reflect the current cost of fossil fuel."

(5) "Duke proposes that an additional amount of .4326 cent per KWH be added in Duke's rates and charges as a result of the increased costs which it has actually incurred for fossil fuel used in the generation of electrical energy." (The application then goes on to set out detailed figures and other information upon which the requested increase is based.)

(6) "The fuel clause presently in effect permits Duke to recover the difference between the actual cost it occurs in generating electricity with fossil fuel and the cost (.5035 cent per KWH) which is presently recovered through its basic rates, which were approved by final order entered October 10, 1974, in Docket No. E-7, Sub 159. The recovery, however, is not made until the fuel adjustment factor is billed to Duke's North Carolina retail customers in the second month following the month in which the cost is incurred. The actual fuel cost to be recovered through the fuel clause is recorded on Duke's books and records as unbilled revenues in the month incurred, two months in advance of the time it is actually billed and recovered. This accounting treatment was approved by the Commission in its order of February 3, 1974, in Docket No. E-7, Sub 161. Accordingly, the fuel costs being billed and recovered by Duke during the month of June, 1975, are those costs that were actually incurred and recorded on its books as unbilled revenues during the month of April, 1975."

(7) "Upon the entry of an order by the Commission in this Docket pursuant to Duke's present Application filed under G.S. 62-134(e), Duke's fuel clause will terminate. At the time of such termination, Duke will have recorded on its books revenues for two months, but such revenues will be unbilled and uncollected. This unrecovered amount represents two forward months' billings on the presently effective fuel clause for expenses incurred in the most recent two months. These costs, which have not yet been determined but which are estimated to be in excess of $17,000,000, will be accrued but not collected by Duke unless recoverable under an order of the Commission. The recovery of these costs is necessary in order to comply with the Commission's accounting order of February 3, 1975. Furthermore, Duke cannot absorb these costs and continue to provide adequate service to its customers."

(8) "Duke therefore requests that it be permitted to recover the two months' fossil fuel costs which upon the effectiveness of an order issued by the Commission pursuant to this Application will be incurred but uncollected, over a 12 months period beginning with the effectiveness of an order issued herein, by amortizing the recovery in accordance with Temporary Rate Adjustment Rider No. 1, which is attached hereto as Exhibit 3."

On 3 July 1975 the Commssion entered an order suspending the proposed rates and scheduling a hearing on the application.

On 21 July 1975 the Commission entered an order allowing the Attorney General of North Carolina, representing the using and consuming public, to intervene as a party to the proceeding.

On 27 August 1975, following hearings at which oral and documentary evidence was presented, the Commission entered its order in which it found facts substantially as contended by Duke and made the following "CONCLUSIONS":

> With the elimination of currently approved fuel adjustment charges from Duke's retail electric rates on September 1, 1975, pursuant to recently enacted N.C.G.S. 62-134(e), said rates will no longer be designed to fully recover fuel expenses incurred by Duke in providing electric utility service to its North Carolina retail customers. The basic rates currently in effect were designed to reflect fuel cost levels existing in October 1973. Current fuel costs are approximately double this level.
>
> "Duke's basic retail electric rates should be adjusted by the addition of 0.4181 cent/KWH, said adjustment being based on generating and fuel cost statistics for June, 1975 and reflecting a reasonable estimate of the increase in fuel costs above those currently being recovered in Duke's basic rate design.
>
> "Should generating and fuel cost statistics of subsequent months reflect fuel cost levels lower than those reflected in the adjusted basic rates, then Duke should immediately file for further adjustment to its rates to reflect these lower cost levels.
>
> "Future filings for rate increases based solely on the cost of fuel pursuant to N.C.G.S. 62-134(e) can be reviewed more efficiently if such filings are based on Duke's current fuel adjustment formula using generating and fuel cost statistics in the third month preceding the billing month. This formula may be used to facilitate processing until such time as it may be modified in a general rate case. Duke should continue to file the monthly fuel adjutment charge report and the supporting monthly fuel cost and supply report to assist the Commission and the Staff monitoring fuel costs and their possible effects on future retail electric rates.
>
> "With the elimination of the so-called 'automatic' fuel adjustment charge, Duke will have approximately

$17,000,000 of unbilled fuel charge revenues accrued because of accounting procedures that will become unrecoverable under existing rates. These unbilled revenues result from reasonable expenses incurred in the providing of electric utility service to North Carolina retail consumers and were accrued under accounting practices previously approved by this Commission. Duke should be allowed to recover these unbilled revenues by a surcharge designed to recover the total accrual over a period of twelve months.

"Accrual of unbilled revenues accounting to reflect the lag in recovery of increased fuel costs should be disallowed in the future. These practices were appropriate under an automatic fuel adjustment clause but are not appropriate for a rate case, either general or cost of fuel only.

"Bills after September 1, 1975 should show charges under the basic rate schedules and an 'approved fuel charge' separately. The approved fuel charge is effectively an adjustment to the basic rate to reflect changes in the cost of fuel and is stated separately only to facilitate individual customers in the computation and verification of their bills. The temporary surcharge designed to collect unbilled revenues may be included in the 'approved fuel charge' portion of the bill because of computer limitations."

The order then provided:

"IT IS, THEREFORE, ORDERED:

"1. That effective on bills rendered on and after September 1, 1975, Duke Power Company is hereby authorized to adjust its basic retail electric rates by the addition thereto of 0.4181 cent/KWH based solely on increased fuel costs pursuant to North Carolina G.S. 62-134(e).

"2. That following any decrease in fuel cost levels below those existing in the basic rates as adjusted for fuel cost increases, Duke Power Company shall immediately file for a downward adjustment to reflect these decreased fuel costs.

"3. That Duke Power Company shall continue to file on a monthly basis the computations of the fuel adjustment report and the supporting fuel cost and supply report.

"4. That effective on bills rendered on and after September 1, 1975, Duke Power Company is hereby authorized to apply a temporary surcharge designed to recover the unbilled revenues accrued as of August 31, 1975 as a result of the lag in the old fuel adjustment clause on its North Carolina retail jurisdictional service. The surcharge should be designed on a cent/KWH basis to recover the total deferral plus associated gross receipts taxes over a period of approximaetly twelve (12) months. The surcharge shall begin on September 1, 1975 and be terminated when the actual unbilled revenue total attributable to North Carolina retail jurisdictional service is recovered. Total dollar billings under this surcharge shall be reported to the Commission monthly.

"5. That accrued accounting of unbilled revenues due to the lag in the old fuel clause is no longer approved by this Commission and should hereby be eliminated in this jurisdiction.

"6. That bills after September 1, 1975 show the basic rate charges and 'approved fuel charges', so entitled, separately. The temporary surcharge may be included under the 'approved fuel charge'."

On 26 September 1975 the Attorney General filed exceptions to the order and notice of appeal. On 27 October 1975 Duke filed a report stating that the amount it billed during September 1975 under the surcharge provision totaled $1,506,930; and that the "actual amount of N. C. unbilled revenue at August 31, 1975 was $18,503,555." On 4 December 1975 the Commission entered an order affirming *in toto* its order of 27 August 1975 and overruling the exceptions filed by the Attorney General.

Attorney General Edmisten, by Special Deputy Attorney General Robert P. Gruber, for appellant.

Commission Attorney Edward B. Hipp, and Assistant Commission Attorney John R. Molm, for North Carolina Utilities Commission, appellee.

Steve C. Griffith, Jr., George W. Ferguson, Jr., and Kennedy, Covington, Lobdell & Hickmen by Clarence W. Walker and John M. Murchison, Jr., for Duke Power Company, appellee.

BRITT, Judge.

The Attorney General challenges that part of the Commission order allowing Duke to impose a temporary surcharge and states his contentions thusly:

"I. The Commission order approving a temporary surcharge allowing Duke to recover so-called unbilled revenues of $18,503,555 for fuel costs incurred in July and August, 1975 was illegal in that it fixed rates retroactively so as to make them collectible for past service.

"II. The Utilities Commission lacks the statutory authority to approve a temporary surcharge for the recovery of specific cost items experienced by a utility in the rendering of past service."

To understand the questions presented by this appeal, it is necessary to review briefly the history of the fuel adjustment clauses which the Commission has authorized Duke to impose. The problem sought to be solved dates back to 1973 when a worldwide energy crisis brought about tremendous increases in the cost of fossil fuels, particularly coal which is used extensively in this country in the generation of electricity.

On 30 November 1973 Duke filed with the Commission an application (Docket E-7, Sub. 161) for authority to adjust its retail electric rates and charges by the addition of a coal adjustment clause to be rendered on monthly bills on and after 1 January 1974. At that time Duke had pending an application (Docket E-7, Sub. 159) for a general rate increase.

On 19 December 1973, an order based on affidavits and other documentary evidence, the Commission consolidated the two applications and, pending a hearing, authorized the requested coal adjustment clause. The order provided that the clause would not be operative unless and until coal costs increased above the October 1973 level, and included the following:

> "1. That effective on bills rendered on and after January 19, 1974 for service rendered on and after December 19, 1973 with respect to coal burned on and after November 1, 1973, the Applicant, Duke Power Company, is authorized and permitted to put into effect the coal cost adjustment clause attached to its application as Exhibit B.

"2. That Duke Power Company will report to the Commission on a monthly basis the amount of the fuel cost adjustment and the factors and computations used in its derivation."

On 17 July 1974 this court dismissed an appeal by the Attorney General from the 19 December 1973 order on the ground that the order was interlocutory. See opinion reported in 22 N.C. App. 497, 206 S.E. 2d 507; *aff'd,* 285 N.C. 759, 209 S.E. 2d 282 (1974).

On 10 October 1974, following lengthy hearings, the Commission entered a final order in Docket No. E-7, Sub. 161, in which it made pertinent findings of fact and conclusions of law and ordered (1) that the fossil fuel adjustment clause become effective 1 November 1974, (2) that the coal clause remain in effect until 1 November 1974, and (3) that Duke file with the Commission each month a complete fossil fuel adjustment clause memorandum.

The Attorney General and other intervenors appealed from the order, attacking the validity of the fuel adjustment clause. In an opinion filed 6 August 1975, and reported in 26 N.C. App. 662, 217 S.E. 2d 201, this court upheld the validity of the fuel clause. A fuller account of the findings and conclusions of the Commission is set forth in that opinion.

Scope of Review

While our decision in this case does not rest on technical rules of procedure, we feel constrained to call attention to Rule 10 of the new North Carolina Rules of Appellate Procedure, 287 N.C. 671 (1975), which became effective with respect to all appeals taken from orders and judgments of trial tribunals, including the Utilities Commission, in which notice of appeal was given on and after 1 July 1975. Since the orders appealed from in the instant case were entered subsequent to that date, the new rules apply. Rule 10(a) provides:

"*Function in Limiting Scope of Review.* Except as otherwise provided in this Rule 10, the scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal in accordance with this Rule 10. No exception not so set out may be made the basis of an assignment of error; and no exception so set out which is not made the

basis of an assignment of error may be considered on appeal. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, notwithstanding the absence of exceptions or assignments of error in the record on appeal. "

With respect to exceptions to findings of fact and conclusions of law, the last sentence of Rule 10(b)(2) provides "A separate exception shall be set out to the making or omission of each finding of fact or conclusion of law which is to be assigned as error." The drafting committee's commentary regarding this sentence, *Ibid,* p. 702, states: "The last sentence carries forward an established rule of decision which has prohibited 'broadside exceptions' to multiple findings or conclusions. *Logan v. Sprinkle,* 256 N.C. 41 (1961)."

All of the Attorney General's exceptions and assignments of error are to the signing and entry of the orders appealed from, with reasons given as to why the orders are invalid. In his assignment No. 5 (Ex. No. 3) as set forth in his grouping of exceptions and assignments, he alludes to "certain Findings and Conclusions" including one which he summarizes, and states that the findings and conclusions (presumably referring to all of them) are unsupported by competent, material and substantial evidence in view of the entire record as submitted, "and said Order is therefore arbitrary and capricious." Where the orders are set out in the record on appeal, no exception is noted to any finding of fact or conclusion of law.

We hold that there is no proper exception to the findings of fact and conclusions of law set forth in the orders, therefore, the findings and conclusions are presumed to be correct. Our review is limited to the questions whether the orders are supported by the findings of fact and conclusions of law.

MERITS OF THE CASE

The main thrust of the Attorney General's contention is that the part of the 27 August 1975 order allowing Duke to apply a temporary surcharge to collect its increased fuel costs for July and August of 1975 constitutes retroactive rate fix-

ing which is not authorized by our statutes and has been declared illegal by our Supreme Court.

Specifically, the Attorney General argues that one of the primary statutes giving the Commission the authority to fix rates is G.S. 62-136, and that subsection (a) of that statute authorizes a fixing of rates "to be *thereafter* observed and in force" (emphasis ours). He further argues that in *Utilities Commission v. City of Durham,* 282 N.C. 308, 318, 193 S.E. 2d 95, 102 (1972), the Supreme Court declared that "the Commission may not fix rates retroactively so as to make them collectible for past service."

The Commission argues that there is a difference between rate fixing and approving a fuel clause designed to recover previously incurred costs. We find this argument persuasive.

Rate fixing contemplates considerably more than altering one component in the rate structure of a public utility. The catchline of G.S. 62-133 is "How rates fixed." The statute then provides that in fixing rates for certain public utilities (including power companies), the Commission, among other things, shall ascertain the fair value of the public utility's property used and useful in providing the service rendered to the public within this State, estimate the utility's revenue under present and proposed rates, ascertain the utility's reasonable operating expenses, and fix a rate of return on the fair value of the property as will enable the utility by sound management to produce a fair profit for its stockholders.

While the cost of fuel for its generating plants is undoubtedly a major expense item for Duke and other power companies, such cost is only one of many factors that G.S. 62-133 requires the Commission to consider in fixing rates. In *City of Norfolk v. Virginia Electric and Power Company,* 197 Va. 505, 90 S.E. 2d 140 (1955), the Virginia Supreme Court of Appeals, in approving a fuel clause (referred to by that court as an escalator clause) for a power company under its jurisdiction, recognized a distinction between rate fixing and approving a fuel clause. We quote from the opinion:

> "[T]he escalator clause is, therefore, highly remedial; it confers no benefit on the stockholders of the company except to help the avoidance of unjustified loss, and . . . it

likewise deprives them of the possibility of keeping an unjustified gain."

* * *

"In approving the escalator clause the Commission did not fix rates retroactively, but on the contrary, it authorized and prescribed a fixed mathematical formula to be inserted in the schedules of the Company which will serve as a 'guide, direction, or rule or action' for determining future rates." 90 S.E. 2d at 146-48.

We think G.S. 62-136(a) refers to rate fixing as envisioned by G.S. 62-133. We also think the declaration by our Supreme Court in *Utilities Commission v. City of Durham, supra,* quoted above, was made in the context of a general rate fixing case and is not controlling in this case.

On 30 November 1973 when Duke applied to the Commission for authority to implement an automatic coal adjustment clause (also referred to herein as a fuel clause), it was operating within a rate structure that had been determined by the Commission pursuant to G.S. 62-133. That structure included an item of .5035 cent per KWH for cost of fossil fuel. The order of the Commission entered 19 December 1973 authorizing Duke to implement a fuel clause, which order is the root of the question presented by this appeal, did not "fix rates" but was only a means to make the .5035 cent per KWH for cost of fuel a workable figure from the standpoint of Duke and its customers.

By the enactment of Section 8 of Chapter 243 of the 1975 Session Laws [G.S. 62-134(e) quoted above], the General Assembly indicated an intent that the cost of fuel used in the generating of electricity by a public utility should be treated as a factor separate from all others in the utility's rate structure. The new statute expressly states that a proceeding under it shall not be considered a general rate case. It streamlines the procedure for considering an application to change the cost of fuel component and requires the Commission to rule on the application within 90 days after it is filed.

The record discloses that after October 1973 Duke could not determine the accurate cost of fuel per KWH for a given month until two months later, therefore, bills rendered in January 1974 included increased fuel costs for November 1973; that this caused a two months' lag in recovering the increased

fuel costs, thereby necessitating the surcharge in question to collect for July and August 1975.

While the 19 December 1973 and 10 October 1974 orders might have been clearer in their provisions that Duke's recovery of increased fuel costs would relate back to include November and December of 1973, a liberal construction of the orders leads us to conclude that they were sufficient to accomplish that purpose.

We hold that the Commission did not exceed its authority in entering the orders appealed from.

Affirmed.

Judge HEDRICK concurs.

Judge MARTIN dissents.

Judge MARTIN dissenting.

In fixing rates to be charged by a public utility, the Commission is exercising a function of the legislative branch of the government, and has only that power conferred upon it by G.S. Chapter 62. *Utilities Commission v. General Telephone Company of the Southeast,* 281 N.C. 318, 336 (1972).

G.S. 62-130(a) authorizes the Commission to fix rates, and G.S. 62-130(d) authorizes the Commission to revise and change rates from time to time as circumstances may require. G.S. 62-136(a) authorizes the Commission to investigate existing rates on its motion or upon complaint of anyone directly interested, and if the rates are found to be unjust and unreasonable, the Commission has the authority to determine the rates to be thereafter observed and in force. In investigating rates and setting rates for the future under the broad authority of G.S. 62-136(a), the legislature has given the Commission specific procedural and substantive guidelines to follow in fixing rates. G.S. 62-133 empowers the Commission to conduct a general rate hearing if the utility seeks an increase in rates which affects the entire rate structure of the utility. G.S. 62-73 and 74 allows a proceeding when the utility, a customer, or the Commission wishes to investigate a single rate or small part of the rate structure. *Utilities Commission v. Carolina Power and Light*

Company, 250 N.C. 421 (1959); *Utilities Commission v. Tidewater Natural Gas Company,* 259 N.C. 558 (1963). G.S. 62-134(e) provides for an investigation of a rate increase application based solely upon the increased cost of fuel. G.S. 62-137 requires the Commission to declare the scope of the hearing.

This Court has recently approved the use of a fuel escalator clause to set rates, stating that G.S. 62-3(24), which defines "rate" is worded in such a broad manner as to encompass the use of a formula. *Utilities Commission v. Edmisten, Attorney General,* 26 N.C. App. 662 (1975). I dissented in that case, and the question presented has not yet been decided by our Supreme Court. If it is assumed that a formula implemented under G.S. 62-3(24) is a valid rate making device, then G.S. 62-3(24) and the formula are subject to the limitations of G.S. 62-136(a).

When the statutes are viewed in harmony, and each is given its proper effect, it appears that whether rates are fixed under G.S. 62-133, G.S. 62-73, G.S. 62-74, G.S. 62-134(e), or G.S. 62-3(24) investigation and ordered change must be made under the umbrella of the authority given by G.S. 62-136(a) and G.S. 62-130.

A rate is fixed or allowed when it becomes effective pursuant to Chapter 62. G.S. 62-130(a). And rates must be fixed prospectively from their effective date. G.S. 62-136(a) provides that the Commission shall determine rates "to be thereafter observed and in force." This statute, which controls all rates set under G.S. Chapter 62, allows the Commission to set for a utility a reasonable rate for service to be rendered in the immediate future. The Commission may not fix rates retroactively so as to make them collectable for past service. *Utilities Commission v. City of Durham,* 282 N.C. 308, 318 (1972); *Utilities Commission v. Morgan,* 277 N.C. 255, 267 (1970). See *Public Utilities Commission v. United Fuel Gas Co.,* 317 U.S. 456, 464, 87 L.Ed. 396, 63 S.Ct. 369.

In a general rate case conducted pursuant to G.S. 62-133, a utility's historical costs and earnings during a proscribed test period must be considered. The test period operating experience of the utility must be adjudged pro forma to account for all known changes and conditions affecting revenues and expenses so that the test period will accurately reflect the immediate future. Thus specific expense items which occurred in the past are not calculated so that they may be actually recovered by future

rates. They are calculated only to be used as the most reasonable estimate of what the company may anticipate in the future.

The use of historical operating data to set rates for the future is not limited to setting rates under G.S. 62-133 when a test period is used. It applies to setting rates under any other proceeding or rate making device used in North Carolina. These principles apply to the use of an automatic fuel adjustment clause as well as to nonautomatic procedures.

Thus, a fuel clause is a prospective device—it sets rates for the future. The fuel clause applied in any given month, could not be applied retroactively to collect past fuel costs, incurred in rendering service prior to the effective date of the fuel clause, although billings rendered under the fuel clause were based on actual past costs. Billings under the fuel clause were intended to collect fuel costs in the months billings were rendered and the costs two months prior to the billings were used in the billing month as a proxy for the actual costs in the most current months. This procedure is the same in principle as applied in setting rates under G.S. 62-133.

When the fuel clause or coal clause was initially approved on December 19, 1973, as a result of Duke's application filed on November 30, 1973, legally it had to operate prospectively on and after December 19, 1973. Although burned coal costs on and after November 1, 1973 were used as the best estimate of or cost proxy for billings on and after January 19, 1974, Duke could not be allowed to recover its burned costs prior to that date. To have allowed the coal clause to recover coal costs burned on and after November 1, 1973, would have been the clearest example of retroactive rate making. *Utilities Commission v. Morgan, Attorney General, supra.* G.S. 62-136(a). The November, 1973 burned costs were simply used as the best estimate of costs to be billed from January 19, 1974 to February 19, 1974. Since the coal clause at its inception was prospective, no legally recoverable two months lag arose.

The critical factor is that the $18,503,555 in fuel costs were costs incurred in rendering service prior to the effective date of the Commission order of August 27, 1975, and the Commission acted in excess of its statutory authority by allowing these costs to be recovered retroactively. The surcharge is an illegal rate or charge for services rendered in the past. The Commission had no authority to go back and set rates for serv-

ices rendered in July and August, 1975, in order to recover unbilled revenues. G.S. 62-136(a), *Utilities Commission v. Morgan, Attorney General, supra.*

G.S. 62-134(e) only allows for recovery of increased cost of fuel used in the generation or production of electric power. There is no increased cost of fuel on and after September 1, 1975, involved in the costs being recovered under the temporary surcharge. These are past non-recurring expenses incurred for past service prior to the issuance of the Commissioner's order in this case. Further, G.S. 62-134(e) plainly prohibits attempts to carry the old fuel clause forward past September 1, 1975, and this is precisely what the Commission has attempted to do through its approval of the temporary surcharge. The Commission totally lacks statutory authority or jurisdiction to approve the temporary surcharge.

I vote to reverse.

STATE OF NORTH CAROLINA EX REL., UTILITIES COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY v. RUFUS L. EDMISTEN, ATTORNEY GENERAL

No. 7610UC311

(Filed 18 August 1976)

APPEAL by the Attorney General of North Carolina, on behalf of the Using and Consuming Public and State Agencies, from orders of the North Carolina Utilities Commission entered 27 August 1975 and 4 December 1975. Heard in the Court of Appeals 15 June 1976.

Attorney General Edmisten, by Special Deputy Attorney General Robert P. Gruber, for appellant.

Commission Attorney Edward B. Hipp and Assistant Commission Attorneys John R. Molm and Wilson B. Partin, Jr., for North Carolina Utilities Commission, appellee.

Joyner and Howison, by R. C. Howison, Jr., for Virginia Electric and Power Company, appellee.

BRITT, Judge.

While the dates of certain previous orders are different, and the rates per KWH and total amounts of money involved are not the same, the questions of law presented by this appeal are substantially the same as those presented in *State of North Carolina ex rel. Utilities Commission and Duke Power Company, Applicant v. Rufus L. Edmisten, Attorney General,* No. 7610UC209, opinion filed this day. For the reasons stated in that opinion, the orders appealed from in this cause are

Affirmed.

Judge HEDRICK concurs.

Judge MARTIN dissents.

Judge MARTIN dissenting.

For the reasons stated in my dissent filed this day in *State of North Carolina, ex rel., Utilities Commission and Duke Power Company, Applicant v. Rufus L. Edmisten, Attorney General,* No. 7610UC209, I vote to reverse that portion of the Commission's order authorizing a surcharge allowing Virginia Electric and Power Company to recover approximately $3,500,000 for fuel expenses.

STATE OF NORTH CAROLINA EX REL., UTILITIES COMMISSION AND CAROLINA POWER AND LIGHT COMPANY, APPLICANT v. RUFUS L. EDMISTEN, ATTORNEY GENERAL

No. 7610UC230

(Filed 18 August 1976)

APPEAL by the Attorney General of North Carolina, on behalf of the Using and Consuming Public and State Agencies, from orders of the North Carolina Utilities Commission entered 27 August 1975 and 4 December 1975. Heard in the Court of Appeals 15 June 1976.

Attorney General Edmisten, by Special Deputy Attorney General Robert P. Gruber, for appellant.

Commission Attorney Edward B. Hipp, Assistant Commission Attorney John R. Molm, and Assistant Commission Attorney Wilson B. Partin, Jr., for North Carolina Utilities Commission, appellee.

Joyner & Howison, by Robert C. Howison, Jr., and William E. Graham, Jr., for Carolina Power & Light Company, appellee.

HEDRICK, Judge.

While the dates of certain previous orders are different, and the rates per KWH and total amounts of money involved are not the same, the questions of law presented by this appeal are substantially the same as those presented in *State of North Carolina ex rel. Utilities Commission and Duke Power Company, Applicant v. Rufus L. Edmisten, Attorney General,* No. 7610UC209, opinion filed this day. For the reasons stated in that opinion, the orders appealed from in this cause are

Affirmed.

Judge BRITT concurs.

Judge MARTIN dissents.

Judge MARTIN dissenting.

For the reasons stated in my dissent filed this day in *State of North Carolina ex rel., Utilities Commission and Duke Power Company, Applicant v. Rufus L. Edmisten, Attorney General,* No. 7610UC209, I vote to reverse that portion of the Commission's orders authorizing Carolina Power and Light Company to apply a surcharge for the recovery of approximately $15,500,000 for fuel expenses incurred prior to 1 September 1975.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA AUTOMOBILE RATE ADMINISTRATIVE OFFICE, NATIONWIDE MUTUAL INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, THE AETNA CASUALTY AND SURETY COMPANY, THE TRAVELERS INDEMNITY COMPANY, HARTFORD ACCIDENT AND INDEMNITY COMPANY, GREAT AMERICAN INSURANCE COMPANY, UNITED STATES FIDELITY AND GUARANTY COMPANY, LUMBERMEN'S MUTUAL CASUALTY COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, IOWA NATIONAL MUTUAL INSURANCE COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, UNIGARD MUTUAL INSURANCE COMPANY, MARYLAND CASUALTY COMPANY, THE SHELBY MUTUAL INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, MIDWEST MUTUAL INSURANCE COMPANY, UNIVERSAL UNDERWRITERS INSURANCE COMPANY, AND BALBOA INSURANCE COMPANY

No. 7510INS929

(Filed 18 August 1976)

1. **Insurance § 79.1— motorcycle liability insurance rates — consideration of withdrawn filing**

It was improper for the Commissioner of Insurance to consider a 1970 motorcycle liability insurance rate filing which the Automobile Rate Administrative Office had requested be withdrawn since (1) a new filing was mandated by G.S. 58-30.3 and G.S. 58-30.4 and (2) the Rate Office had the right to withdraw the 1970 filing.

2. **Insurance § 79.1— automobile liability insurance — revision of classifications and rates — applicability of statute to motorcycles**

Although G.S. 58-30.4 refers to revised classifications and rates for private passenger "automobiles," the statute also applies to motorcycles since at the time of the enactment of the statute the General Assembly was aware that the word "automobiles" as used in Article 25 of G.S. Chapter 58 had been interpreted by the courts to include motorcycles.

3. **Insurance § 79.1— automobile liability rates — function of Rate Office — authority of Insurance Commissioner**

G.S. 58-248.1 does not permit the Commissioner of Insurance to ignore the function of the Automobile Rate Administrative Office and encroach upon its authority to propose rates for automobile and motorcycle liability insurance.

4. **Insurance § 79.1— automobile liability rates — authority of Insurance Commissioner**

The authority of the Commissioner of Insurance to approve or disapprove automobile insurance rates and classifications pursuant to G.S. 58-248 is no greater than his authortiy to revise improper rates

or classifications according to G.S. 58-248.1, the only noticeable difference between the two statutes being that G.S. 58-248 governs exclusively the approval or disapproval of proposed rates and classifications filed by the Rate Office, whereas G.S. 58-248.1 authorizes the Commissioner to revise improper rates and classifications, presently charged or filed, on his own motion.

5. **Insurance § 79.1— automobile liability rates — action by Insurance Commissioner — necessity for evidence and findings of fact**

Whether the Commissioner of Insurance elects to approve or disapprove a rate proposal pursuant to G.S. 58-248 or to revise a proposal pursuant to G.S. 58-248.1, his action must be supported by substantial evidence and comprehensive findings of fact therefrom which comply with the standard prescribed by G.S. 58-248.

6. **Insurance § 79.1— motorcycle liability insurance — classifications and rates — insufficiency of evidence and findings**

Order by the Commissioner of Insurance revising the classifications and rates for motorcycle liability insurance was not supported by substantial evidence or necessary findings of fact.

Judge MARTIN dissents.

APPEAL by defendants from Ingram, Commissioner of Insurance. Order entered 22 August 1975. Heard in the Court of Appeals 10 March 1976.

This appeal is an outgrowth of the order entered by the Commissioner of Insurance on 22 August 1975 which revised the classification plan and rates for motorcycle liability insurance in North Carolina.

On 18 June 1975 the North Carolina General Assembly enacted House Bill 28 (Session Laws of 1975, Chapter 666), codified as G.S. 58-30.3 and G.S. 58-30.4, entitled "AN ACT TO ABOLISH AGE DISCRIMINATION IN AUTOMOBILE INSURANCE CLASSIFICATIONS AND TO IMPLEMENT CLASSIFICATIONS WHICH ESTABLISH OBJECTIVE STANDARDS FOR RATES." Two days later the Commissioner of Insurance published notice of a public hearing for the following purposes:

"I. On Petition of the North Carolina Automobile Rate Administrative Office, to rehear and determine a filing of the North Carolina Rate Administrative Office dated May 7, 1970, for a 'Revised Classification and Rating Procedure —Motorcycles.'

"II. On Motion of the Commissioner of Insurance pursuant to the provisions of G.S. 58-248.1, to abolish age dis-

crimination in motorcycle insurance classifications pursuant to the provisions of House Bill 28, ratified by the General Assembly of North Carolina on June 18, 1975; to review the present weight classification system for motorcycle liability insurance to determine whether all remaining classifications for motorcycle liability insurance meet the standards prescribed by G.S. 58-248.1; to determine whether the rates in general for motorcycle liability insurance are excessive or otherwise not in compliance with law; and to issue such corrective orders as are necessary."

The hearing was scheduled to begin on 11 July 1975, and a prehearing pursuant to G.S. 58-248.1 was scheduled for 25 June 1975. At the prehearing the Rate Office objected to the proposed hearing on the grounds that the 7 May 1970 filing was obsolete and no longer subject to review by the Commissioner. The Commissioner overruled this objection.

On 9 July 1975 the Rate Office mailed a circular letter to members of the Governing Committee. The letter stated in pertinent part:

"A copy of House Bill 28 which was enacted by the North Carolina General Assembly and ratified on June 18, 1975, was attached to a circular letter to the Governing Committee issued on that same date. That circular letter included the recommendation of the undersigned that the task of formulating recommendations for compliance with this new law by the Rate Administrative Office be assigned to the Subcommittee on Rates. There was no objection to that recommendation, and the Subcommittee was requested so to proceed.

"Three Subcommittee meetings have been held since the aforementioned circular letter was issued. The meeting dates were June 19 and 26 and July 7. The exhibits attached hereto present revised classification and subclassification plans for private passenger cars and motorcycles reflecting the recommendations of the Subcommittee as understood by the undersigned.

. . . .

"It is recommended that the enclosed amended rules and rates be adopted by the Governing Committee for filing with the Commissioner of Insurance for approval . . . "

The following day, on 10 July 1975, the Rate Office filed a verified response to notice, motion for intervention, and motion to dismiss prehearing conference. In support of these motions the Rate Office (1) referred to its duty and authority to promulgate rates and classifications for motorcycle liability insurance; (2) asked that the 7 May 1970 filing be withdrawn, and repeated its contention that the 7 May 1970 filing was obsolete due to the Commissioner's earlier rejection of that filing in a 1 May 1974 order, which was subsequently reversed and vacated by the North Carolina Court of Appeals in *Comr. of Insurance v. Automobile Rate Office,* 24 N.C. App. 223, 210 S.E. 2d 441 (1974), *cert. denied* 286 N.C. 412, 211 S.E. 2d 216 (1975); (3) argued that the prehearing meeting conducted on 25 June 1975 was premature and improper because the Rate Office had no valid filing pending before the Commissioner; and moved for dismissal of the prehearing conference; (4) argued that the Commissioner had no authority to conduct the proposed hearing because it would prevent and preclude the Rate Office from performing its legal duties and responsibilities under the law of preparing and filing with the Commissioner of Insurance for his approval a revised basic classification plan and a revised subclassification plan for automobile and motorcycle liability insurance under the provisions of G.S. 58-30.3 and G.S. 58-30.4; and (5) argued that it (the Rate Office) was a necessary party to the proceeding and asked that it be permitted to make a filing as required by G.S. 58-30.3 and G.S. 58-30.4.

On the same day, Balboa Insurance Company, Midwest Mutual Insurance Company, and Universal Underwriters Insurance Company filed a similar response to notice, motion for intervention, and motion to dismiss prehearing conference, based on "the motion of the Rate Office that no further action be taken in this proceeding until the Rate Office has completed its motorcycle liability insurance filing and public hearings thereon have been set in accordance with law; and that the prehearing conference heretofore held be dismissed and treated as a nullity."

On the following day (11 July 1975) the hearing was convened. The Commissioner received in evidence the record of the prehearing meeting, which included the record of the previous hearing on the 7 May 1970 motorcycle liability insurance filing. In addition, the Commissioner called Rate Office Assistant General Manager John Watkins, Jr., as a witness and questioned

him about the forthcoming classification and rate filing by the Rate Office, and heard arguments on the motions filed by the Rate Office and the three insurance companies mentoned above. The motions were denied, and the Commissioner proceeded with the hearing on the basis of the 1970 filing and G.S. 58-248.1.

Thereafter Dock Hamm was qualifed as an expert in the marketing of motorcycles in North Carolina and testified that the experience of the operator, not size or use, is the most important determinant of exposure to risk of motorcycles.

On 15 July 1975 the Rate Office submitted its filing for motorcycle liability insurance to comply with G.S. 58-30.3 and G.S. 58-30.4, entitled "Re: Revised Classification and Sub-Classifcation Plan—Motorcycles." Mr. Paul Mize, Rate Office general manager, testified at length about the Rate Office's interpretation of House Bill 28 and the preparation of the filing. In addition to Mr. Mize's testimony, the filing was supported by extensve exhibits. An amendment to the filing was filed with the Commissioner on 29 July 1975 and subsequently explained by the testimony of Mr. Mize on 4 August 1975.

On 4 August 1975 Robert Holcombe testified as "an expert in the field of liability insurance rate analysis"; based on data prepared for and offered with the 5 May 1970 filing plus extensive calculations of his own, Mr. Holcombe recommended new motorcycle liability insurance rates of $17.00 for $15,000/30,000/5,000 coverage of light motorcycles and $37.00 for the same coverage of heavy motorcycles. The hearing ended on 4 August. By exhibit filed 19 August 1975 Mr. Holcombe modified his calculations somewhat and recommended rates of $17.00 for $15,000/30,000/5,000 coverage of light motorcycles and $38.00 for the same coverage of heavy motorcycles.

After making findings of fact and conclusions of law, the Commissioner entered an order dated 22 August 1975, which, in pertinent part, provides:

> "1. That the existing classification system for motorcycle liability insurance is hereby terminated effective September 2, 1975.
>
> "2. That the May 7, 1970 filing of the Rate Office and the July 15, 1975 proposal of the Rate Office as modified by its July 27, 1975 proposal are rejected and disapproved.

"3. That effective September 2, 1975, the premium rate charged and collected for motorcycle liabiltiy insurance and the classification system for such insurance be as set forth in the following classification system and premium rate schedule:

	Code 9510 and 9600 (not over 324 c.c.)	Code 9520 and 9610 (over 324 c.c.)
15/30 Bodily Injury	$12	$29
5000 Property Damage	5	9
Total	$17	$38"

From this order the Rate Office and numerous insurance companies appealed.

Attorney General Edmisten, by Assistant Attorney General Isham B. Hudson, Jr., for the plaintiff.

Allen, Steed and Pullen, by Arch T. Allen and Lucius W. Pullen; Broughton, Broughton, McConnell & Boxley, by J. Melville Broughton, Jr.; Manning, Fulton & Skinner, by Howard E. Manning; Young, Moore & Henderson, by R. Michael Strickland; and Bailey, Dixon, Wooten, McDonald & Fountain, by Wright T. Dixon, Jr., for the defendants.

BROCK, Chief Judge.

[1] Initially, the defendants argue that it was improper for the Commissioner to review the 1970 filing. We agree. A new filing was mandated by G.S. 58-30.3 and G.S. 58-30.4, and a review of the 1970 filing could serve no present purpose. The request of the Rate Office to be allowed to withdraw the 1970 filing should have been granted. *Comr. of Insurance v. Rating Bureau,* 29 N.C. App. 237, 224 S.E. 2d 223 (1976). Apparently the Commissioner's sole purpose in undertaking to review the 1970 filing was to use data from that proposal to formulate the rates adopted in his 22 August 1975 order. Such was clearly unnecessary. The Commissioner is authorized by G.S. 58-248 "to compel the production of all books, data, papers and records and any other data necessary to compile statistics for the purpose of determining the underwriting experience of automobile [motorcycle] liability injury and property damage insurance and the other lines of insurance referred to in this Article. . . ."

On 18 June 1975 the General Assembly ratified "AN ACT TO ABOLISH AGE DISCRIMINATION IN AUTOMOBILE INSURANCE

CLASSIFICATIONS AND TO IMPLEMENT CLASSIFICATIONS WHICH ESTABLISH OBJECTIVE STANDARDS FOR RATES," G.S. 58-30.3 and G.S. 58-30.4. These sections provide as follows:

"§ 58-30.3. Discriminatory practices prohibited.—No insurer shall after September 1, 1975, base any standard or rating plan for private passenger automobiles or motorcycles, in whole or in part, directly or indirectly, upon the age or sex of the persons insured.

"§ 58-30.4. Revised classifications and rates. — The North Carolina Automobile Rate Administrative Office shall file with the Commissioner of Insurance for his approval or other action as provided in G.S. 58-248.1 a revised basic classification plan and a revised subclassification plan for coverages on private passenger (nonfleet) automobiles in this State affected by the provisions of G.S. 58-30.3. Said revised basic classification plan will provide for the following four basic classifications, to wit: (i) pleasure use only; (ii) pleasure use except for driving to and from work; (iii) business use; and (iv) farm use. The North Carolina Automobile Rate Administrative Office shall file with the Commissioner of Insurance for his approval or other action as provided in G.S. 58-248.1 a revised subclassification plan with premium surcharges for insureds having less than two years' driving experience as licensed drivers, or having a driving record consisting of a record of a chargeable accident or accidents, or having a driving record consisting of a conviction or convictions for a moving traffic violation or violations, or any combination thereof. Said subclassification plan shall be designed to provide not less than one forth of the total premium income of insurers in writing and servicing the aforesaid coverages in this State.

"The revised basic classification and subclassification plans specified in this section shall supersede the existing basic classification and subclassification plans on the hereinabove specified coverages.

"The Commissioner is authorized and directed to implement the plans provided for in this section on September 2, 1975."

[2] The Rate Office contends that both G.S. 58-30.3 and G.S. 58-30.4 apply to private passenger automobiles and motorcycles. We agree. In 1974 we held:

> "Such authority as the Commissioner has with respect to motorcycle liability insurance rates is contained in Article 25 of G.S. Chap. 58, which also provides for the creation and prescribes the functions of the North Carolina Automobile Rate Administrative Office. The word 'motorcycle' does not appear in Article 25 of G.S. Chap. 58, but the statutes in that Article use the words 'automobile' and 'motor vehicles which are private passenger vehicles' and 'private passenger vehicles' interchangeably, and although none of these terms are further defined in G.S. Chap. 58, we hold that 'automobile' liability insurance includes 'motorcycle' liability insurance and that the same laws apply to both." *Comr. of Insurance v. Automobile Rate Office,* 24 N. C. App. 223, 210 S.E. 2d 441 (1974).

At the time of the passage of G.S. 58-30.3 and G.S. 58-30.4, the Legislature was aware of our interpretation as set out above. Had it chosen to make a distinction in G.S. 58-30.4 between "automobiles" and "motorcycles," it would have done so.

On 11 July 1975 the Rate Office filed with the Commissioner a proposal for revised classifications and rates for motorcycles, and this proposal was disapproved by the Commissioner's 22 August 1975 order.

[3] According to G.S. 58-248, "[t]he Commissioner shall approve proposed changes in rates, classifications or classification assignments to the extent necessary to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest." In addition, the Commissioner is vested with authority to revise rates or classifications, charged or filed, which are found to be excessive, unreasonable, unfairly discriminatory, etc., to the extent necessary "to produce rates, classifications, classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest." G.S. 58-248.1. It is clear that G.S. 58-248.1 does not permit the Commissioner to ignore the function of the Rate Office and encroach upon its authority to propose rates. Chapter 58 grants the Commissioner broad regulatory and supervisory powers for overseeing the faithful execution of the insurance laws of this

State. In *Comr. of Insurance v. Automobile Rate Office,* 287 N.C. 192, 214 S.E. 2d 98 (1975), the scope of the Commissioner's authority under G.S. 58-248.1 was explained at length:

> "When G.S. 58-248.1 is construed *in pari materia* with the other provisions of Chapter 58, we think the legislative grant of authority to the Commissioner to order an alteration or revision in the rates charged or filed presupposes the failure of the Rate Office to perform its rate-making duties faithfully. Before the Commissioner can order, 'to the extent stated in such order,' a rate alteration or revision under G.S. 58-248.1, he must first make a determination that the rates charged or filed are excessive, inadequate, unreasonable, unfairly discriminatory or otherwise not in the public interest. In reaching that determination he 'shall give consideration to past and prospective loss experience, including the loss-trend and other relevant factors developed from the latest statistical data available; to such relevant economic data from reliable indexes which demonstrate the trend of costs relating to the line of automobile insurance for which rates are being considered and to such other reasonable and related factors as are relevant to the inquiry.' G.S. 58-248. . . .
>
> "In the application of these standards, '[p]roposed rates shall not be deemed unreasonable, inadequate, unfairly discriminatory or not in the public interest, if such proposed rates make adequate provision for premium rates for the future which will provide for anticipated loss and loss adjustment expenses, anticipated expenses attributable to the selling and servicing of the line of insurance involved and a provision for a fair and reasonable underwriting profit.' G.S. 58-248; *In re Filing by Automobile Rate Office,* 278 N.C. 302, 180 S.E. 2d 155 (1971). When existing or proposed rates provide for these expenses and for a *fair and reasonable profit,* and no more, the Commissioner has no authority to order alteration or revision of rates under G.S. 58-248.1." *Comr. of Insurance v. Automobile Rate Office, id.*

[4] In our opinion the Commissioner's authority to approve or disapprove rates pursuant to G.S. 58-248 is no greater than his authority to revise improper rates or classifications according to G.S. 58-248.1. Both sections require the Commissioner to

approve, disapprove, or revise rates or classifications to the extent necessary to produce rates or classifications which are "reasonable, adequate, not unfairly discriminatory, and in the public interest." The standards for approving or disapproving rates and revising improper rates or classifications are essentially the same, and the authority granted the Commissioner by each section is likewise the same. The only noticeable difference between the two sections is that G.S. 58-248 governs exclusively the approval or disapproval of proposed rates and classifications filed by the Rate Office, whereas G.S. 58-248.1 authorizes the Commissioner to revise improper rates and classifications, presently charged or filed, on his own motion.

[5] Whether the Commissioner acts pursuant to G.S. 58-248 or G.S. 58-248.1 to review a rate proposal filed by the Rate Office, it is incumbent upon the Commissioner to approve, disapprove, or revise the proposed rates to the extent necessary "to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest." General Statute 58-248 imposes a mandatory duty upon the Commissioner to act according to this standard in response to a filing by the Rate Office, and G.S. 58-248.1 necessarily incorporates this duty with respect to revisions of Rate Office proposals pursuant to G.S. 58-248.1. Furthermore, whether the Commissioner elects to approve or disapprove pursuant to G.S. 58-248 or revise a proposal pursuant to G.S. 58-248.1, his action must be supported by substantial evidence and comprehensive findings of fact therefrom which comply with the standard prescribed by G.S. 58-248 and quoted above.

[6] The Commissioner's disapproval of the Rate Office's 1975 filing, as modified, is based on the following, which are denominated "findings of fact":

> "16. The motorcycle liability insurance rates contained in the July 15, 1975 proposal of the Rate Office as amended by its July 29, 1975 proposal are excessive.
>
> "17. The classification system for motorcycle liability insurance set forth in said proposals is unfairly discriminatory by reason of the following:
>
> "A. The use of motorcycles differs significantly from the use of private passenger automobiles.

"B. The loss experience for motorcycle liability insurance differs significantly from the loss experience for private passenger automobile liability insurance."

The foregoing are not findings of fact, but are bare assertions by the Commissioner which are not supported by substantial evidence. The findings with respect to the proposed classification system are inadequate for the same reasons.

The Commissioner is provided with adequate staff, expertise, and authority to gather and analyze statistical information. If the Commissioner has reason to believe that a filing by the Rate Office does not comply with statutory standards, he should introduce substantial evidence to support his findings, modifying or rejecting the filing.

In this case the Commissioner's order is not supported by substantial evidence or necessary findings of fact.

Reversed and remanded.

Judge VAUGHN concurs.

Judge MARTIN dissents.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA FIRE INSURANCE RATING BUREAU

No. 7610INS121

(Filed 18 August 1976)

1. **Insurance § 116— fire insurance rates — "deemer" provisions — necessity for public hearing**

Insofar as the G.S. 58-27.2(a) requirement for a public hearing on a proposal to revise fire or other pertinent insurance rates may be repugnant to the "deemer provision" of G.S. 58-131.1, the statutory provisions mandating a public hearing must prevail since those provisions were last enacted; therefore, the "deemer provision" of G.S. 58-131.1 will not operate to approve automatically a filing of proposed fire insurance rates in the absence of the hearing required by G.S. 58-27.2(a).

2. **Insurance § 116— fire insurance rates — burden of proof — authority of Commissioner to disapprove**

There is no presumption that a rate filing by the Fire Insurance Rating Bureau is correct and proper, but the Bureau has the burden

of showing that the rate schedule it proposed is fair and reasonable and does not discriminate between risks; however, if the propsed filing complies with the standards of G.S. 58-131, G.S. 58-131.1, and G.S. 58-131.2, and is otherwise supported by substantial evidence, the Commissioner of Insurance lacks authority to disapprove it in the absence of substantial evidence to the contrary.

3. Insurance § 116— automobile physical damage rates — disapproval of revision — insufficiency of findings

The Commissioner of Insurance erred in disapproving proposed rate revisions for automobile physical damage insurance where the Fire Insurance Rating Bureau presented substantial evidence of anticipated loss experience and operating expenses and fair and reasonable profit, and the Commissioner failed to make findings, supported by substantial evidence, specifying why the proposed rates failed to comply with applicable statutory standards or otherwise explaining why the evidence presented by the Bureau to support its filing was not substantial.

Judge MARTIN dissents.

APPEAL by defendant from Ingram, Commissioner of Insurance. Order entered 6 November 1975. Heard in the Court of Appeals 14 May 1976.

On 21 July 1975 the North Carolina Fire Insurance Rating Bureau (Bureau) filed with the Commissioner of Insurance (Commissioner) proposed rate revisions for the Automobile Physical Damage Insurance Program. By letter dated 18 September 1975 the Commissioner acknowledged receipt of the filing, notified the Bureau that the filing had been disapproved, and scheduled a hearing for the proposed revisions on 28 October 1975. The hearing was conducted on 28 October and 30 October 1975. The Bureau called six witnesses, most of whom were specialists and experts in the field of insurance, to explain and justify the proposed rate revisions and offered numerous exhibits in evidence. Except for an exhibit containing an order allowing a fifteen percent downward deviation from the present rate level for the North Carolina Farm Bureau Mutual Insurance Company for the lines of coverage involved in the hearing, the Insurance Department presented no evidence at the hearing. On 6 November 1975 the Commissioner entered an order disapproving the Bureau's proposed rate revisions and leaving the existing rates for automobile physicial damage insurance in effect. From this order the Bureau appealed.

Attorney General Edmisten, by Assistant Attorney General Isham B. Hudson, Jr., for the plaintiff.

Joyner and Howison, by Walton K. Joyner and Edward S. Finley, Jr., for the defendant.

BROCK, Chief Judge.

[1] The Bureau contends that the Commissioner's initial disapproval of the rates proposed by its 21 July 1975 filing was invalid because the Commissioner failed to comply with the hearing requirement of G.S. 58-27.2(a), and consequently, the proposed rates were "deemed approved" upon the Commissioner's failure to disapprove them "in writing within 60 days after submission" according to G.S. 58-131.1.

The apparent conflict between the hearing requirement of G.S. 58-27.2(a) and the "deemer provision" of G.S. 58-131.1 was resolved recently in *Comr. of Insurance v. Rating Bureau,* 29 N.C. App. 237, 224 S.E. 2d 223 (1976). Insofar as the G.S. 58-27.2(a) requirement for a public hearing on a proposal to revise fire or other pertinent insurance rates may be repugant to the "deemer provision" of G.S. 58-131.1, the statutory provisions mandating a public hearing must prevail since those provisions were last enacted. *Comr. of Insurance v. Rating Bureau, id.* It follows that the "deemer provision" of G.S. 58-131.1 will not operate to automatically approve a filing of proposed rates in the absence of a hearing if such hearing is required by G.S. 58-27.2(a). The Bureau's first argument is overruled.

Next the Bureau argues that the Commissioner erred in disapproving the rate provisions proposed in the 21 July 1975 filing. We agree.

[2] There is no presumption that a rate filing by the Bureau is correct and proper. The burden is upon the Bureau to show that the rate schedule proposed by it is "fair and reasonable" and that it does not discriminate unfairly between risks. *In re Filing by Fire Ins. Rating Bureau,* 275 N.C. 15, 165 S.E. 2d 207 (1969). However, if the proposed filing complies with the statutory standards of Article 13 (in particular, G.S. 58-131, G.S. 58-131.1, and G.S. 58-131.2) and is otherwise supported by substantial evidence, the Commissioner lacks authority to disapprove it in the absence of substantial evidence to the contrary.

In general the Commissioner is charged with the duty of overseeing the rate-making process. While the Rating Bureau collects data and prepares proposed rates, the Commissioner is authorized to approve, disapprove, or revise proposed or existing rates in accord with the statutory standards prescribed by Article 13. Indeed the Commissioner's authority to disapprove proposed rates emanates from these statutory standards. Whether proposed rates should be approved or disapproved by the Commissioner, in whole or in part, is governed exclusively by the applicable statutory standards as interpreted and applied by technicians and experts in the field. As quoted in *In re North Carolina Fire Ins. Rating Bureau,* 2 N.C. App. 10, 162 S.E. 2d 671 (1968):

> "Insurance rate making is a technical, complicated and involved procedure carried on by trained men. It is not an exact science. Judgment based upon a thorough knowledge of the problem must be applied. Courts cannot abdicate their duty to examine the evidence and the adjudicaiton, and to interpret and apply the law, but they must recognize the value of the judgment of an Insurance Commissioner who is specializing in the field of insurance and the efficacy of an adjudication supported by evidence of experts who devoted a lifetime of service to rate making."

No doubt, specialists in the field of insurauce are an indispensable aid in determining whether a proposed rate produces a "fair and reasonable profit" (G.S. 58-131.2) or gives "consideration to all reasonable and related factors. . . . " (G.S. 58-131.1).

The fact that the Commissioner personally disapproves of a proposed rate revision does not, standing alone, warrant disapproval of the filing. The Commissioner's disapproval must be based on an affirmative showing that the proposed filing (1) fails to comply with statutory standards or (2) is not supported by substantial evidence, or both.

[3] The Commissioner's disapproval of the Bureau's rate proposal is based on the following findings:

> "5. The filing contained no trend adjustment for changes in claim frequencies.
>
> "6. Portions of the filing were not supported by North Carolina data, but instead relied solely on countrywide data.

"7. Other portions of the filing were not supported by data from all the companies actually in operation in automobile physical damage insurance in North Carolina, but instead relied solely on data from certain selected companies.

"8. Loss and premium data for automobile physical damage insurance in North Carolina for the year ending December 31, 1974 was required to be filed with Insurance Services Office by February 15, 1975, but was not included in this filing made on July 21, 1975.

"9. The Fire Bureau failed to produce substantial evidence upon which the Commissioner could make specific findings of fact as to (1) the reasonably anticipated loss experience during the life of the policies to be issued in the near future, (2) the reasonably anticipated operating expenses in the same period, and (3) the percentage of earned premiums which will constitute a fair and reasonable profit in that period.

"10. The Fire Bureau failed to produce sufficient evidence to support a conclusion that 5% is a fair and reasonable profit for automobile physical damage insurance in North Carolina at this time.

"11. The Fire Bureau failed to show that the rates that it proposed in this filing are fair and reasonable or that said rates will produce a profit which is fair and reasonable.

"12. The filing is improper and the rates proposed therein are unwarranted, unreasonable, improper, unfairly discriminatory, and not in the public interest.

"13. North Carolina Farm Bureau Mutual Insurance Company, an insurance company writing automobile physical damage insurance in North Carolina only, currently has in effect a 15% downward deviation from the rates of the Fire Bureau for automobile physical damage policies, which deviation was requested by a filing dated June 26, 1975, containing data for the entire year of 1974."

The evidence presented by the Bureau indicates that the data referred to findings 5, 6, 7, and 8 was either useless or unnecessary in the formulation of rates in light of the standards of Article 13. This evidence is not refuted. Furthermore, it appears that the Bureau did produce substantial evidence of (1),

(2), and (3) in finding 9. There is no evidence in the record to support the Commissioner's conclusion to the contrary. There is no evidence in the record to refute the Bureau's evidence that five percent is a fair and reasonable profit or to justify the Commissioner's conclusion that the proposed rates are not reasonable and not proper, fair, and in the public interest.

The Commissioner lacks authority to disapprove a filing of proposed rates in the absence of findings of fact, supported by substantial evidence, which specify why the proposed rates fail to comply with applicable statutory standards or otherwise explain why the evidence presented by the Bureau to support its filing is not substantial.

Reversed and remanded.

Judge BRITT concurs.

Judge MARTIN dissents.

BRUCE FAY, t/a THE BOWERY v. THE STATE BOARD OF ALCOHOLIC CONTROL

No. 7610SC88

(Filed 18 August 1976)

1. **Intoxicating Liquor § 2— female employee displaying pubic area — retail beer permit suspended**

Evidence was sufficient to support respondent's finding that petitioner, who held a retail beer permit, allowed in his place of business a dancing girl who exposed her pubic area to customers in violation of G.S. 18A-34(a)(4) and Malt Beverage Regulation VIII D. 16.

2. **Intoxicating Liquor § 2— retail beer permit holder — responsibility for actions of employees**

Petitioner who held a retail beer permit was responsible for the actions of his female employee in displaying her pubic area, though petitioner contended that he attempted to exercise tight supervision over his waitresses, since nothing in the record indicated that the employee involved acted suddenly or unexpectedly or in such a manner as to make it unfair to hold petitioner responsible for her conduct on the licensed premises.

APPEAL by petitioner from *Hobgood, Judge.* Judgment entered 20 November 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 11 May 1976.

Petitioner received notice to appear before the hearing officer of the State Board of Alcoholic Control to show cause why his retail beer permit should not be revoked or suspended for the following alleged violation:

> "Permitting leud, (sic) immoral, or improper entertainment, conduct, or practices upon your licensed premises on or about February 7, 1975, 12:25 a.m. in violation of G.S. 18A-34(a)(4) and Malt Beverage Regulation VIII. D. 16."

At the hearing held 18 April 1975, William Perkins, a Jacksonville City Policeman, testified that on 7 February 1975, at about 12:00 midnight, he observed a white female dancing in the Bowery Bar. She was wearing a "very small brief G-string type bathing suit" and was dancing around the tables serving pitchers of beer. "When she would take the money from the customers, she pulled the front of the bottom G-string to put the change in." Perkins observed her bring a pitcher of beer to a young Marine who "had his hands on both of her hips and she was dancing in a hunching motion at his chest." Perkins testified that "at another table she was waiting on, she brought a pitcher of beer over to the table and pulled the G-string bottom and exposed her pubic hair to retrieve the change." Perkins stated that he saw her twice expose her pubic area which had been shaved. Perkins arrested the girl, charging her with exhibiting her body in an obscene manner. On cross-examination Perkins testified: "I did not see her private parts. The only thing I saw was the pubic hair area and that had been shaved."

Defendant presented witnesses who testified that they were present at the Bowery on the night in question and, although they observed the girl dancing and serving beer, they did not observe her dancing in a lewd manner or exposing her pubic area. The manager of the Bowery testified that he had the girl under very tight supervision, that he did not see her perform any lewd or obscene dances, and that he does not allow the waitresses and dancers to expose their private parts. Petitioner testified that he was in the Bowery on the night in question and watched the girl dance but did not observe her perform what in his opinion was a lewd, obscene, or immoral dance, or expose her private parts.

Based upon this testimony, the hearing officer found that "the permittee did permit improper entertainment, conduct

and practices upon the licensed premises by allowing dancing where the dancing girl exposed her pubic area to customers on the licensed premises on or about February 7, 1975, at 12:25 a.m. in violation of G.S. 18A-34(a) (4) and Malt Beverage Regulation VIII. D. 16." The hearing officer recommended that the permit issued to petitioner, t/a The Bowery, be suspended for 90 days.

The State Board of Alcoholic Control reviewed the recommendation and findings of fact made by the hearing officer and approved his findings of fact as its own. By letter 21 July 1975 the Board notified petitioner:

> "Action is being taken against your retail beer permit because the Board finds as a fact that you did permit improper entertainment, conduct and practices upon your licensed premises by allowing dancing where the dancing girl exposed her pubic area to customers on your licensed premises on or about February 7, 1975, at 12:25 a.m. in violation of G.S. 18A-34(a) (4) and Malt Beverage Regulation VIII D. 16."

The Board ordered petitioner's retail beer permit suspended for a period of 90 days effective 4 August 1975.

Upon petition by defendant, the Wake County Superior Court reviewed the administrative decision of the Board and found its findings of fact and decision to be supported by competent, material and substantial evidence in view of the entire record and that the substantial rights of the Petitioner have not been prejudiced. Petitioner appealed, and the Court ordered that the stay order theretofore granted petitioner should remain in effect pending the outcome of the appeal.

Bailey & Gaylor by Edward G. Bailey for petitioner appellant.

Attorney General Edmisten by Associate Attorney James Wallace, Jr. for the North Carolina State Board of Alcoholic Control, appellee.

PARKER, Judge.

Acting in exercise of the State's police power, our General Assembly enacted Chapter 18A of the General Statutes, entitled "Regulation of Intoxicating Liquors." By G.S. 18A-14(a) The

State Board of Alcoholic Control was created. This Board is given broad powers, including the power "[t]o see that all the laws relating to the sale and control of intoxicating liquor are observed and performed," G.S. 18A-15(1), and the power to adopt "reasonable rules and regulations for the purpose of carrying out the provisions" of G.S. Chapter 18A, G.S. 18A-15(14). The statutes provide for the issuance of permits by the Board, and only those holding a permit from the Board may engage in the sale and distribution of beer. "Other than as authorized by a legally issued permit, there is no right to sell beer, wine, and other alcholic beverages in North Carolina." *Hursey v. Town of Gibsonville,* 284 N.C. 522, 527, 202 S.E. 2d 161, 164 (1974).

"A permit is a privilege granted only to those who meet the standards which the Board has set up and may, and should be, revoked if the permittee fails to keep faith with the Board by observing its regulations and obeying the laws of the State." *Wholesale v. ABC Board,* 265 N.C. 679, 681, 144 S.E. 2d 895, 897 (1965). "A violation of either a statute or a regulation is sufficient to support the suspension of the license." *C'est Bon, Inc. v. Board of Alcoholic Control,* 279 N.C. 140, 145, 181 S.E. 2d 448, 451 (1971); G.S. 18A-43(d).

In the present case the Board, after notice and hearing as provided by law, has found that the petitioner violated both a statute, G.S. 18A-34(a)(4), and Malt Beverage Regulation VIII D. 16. The statute, G.S. 18A-34(a)(4), provides as follows:

> "(a) No holder of a license or permit authorizing the sale at retail of malt beverages or wine (fortified or unfortified) for consumption on or off the premises where sold, or any servant, agent, or employee of the licensee, shall do any of the following upon the licensed premises:
>
> * * *
>
> (4) Permit on the licensed premises any disorderly conduct, breach of peace, or any lewd, immoral, or improper entertainment, conduct, or practices; or permit on the licensed premises any conduct or entertainment by nude performers or entertainers, or person wearing transparent clothing or performances by any male or female performers simulating sexual acts or sexual activities with any person, object, device or other paraphernalia"

Malt Beverage Regulation VIII D.0116 provides that "[n]o permittee nor his employees shall allow or permit any person to perform acts of, or acts which simulate . . . the displaying of the pubic hair, anus, vulva or genitals."

[1] Judicial review of the Board's order suspending petitioner's retail beer permit in the present case is governed by Article 33 of G.S. Ch. 143. (For cognate statutory provisions effective 1 February 1976, see Article 4 of G.S. Ch. 150A.) "Upon such review, the 'whole record' test is applicable, and the decision of the Board may be reversed if substantial rights of the licensee are prejudiced by administrative findings, inferences, conclusions or decisions which are not supported 'by competent, material, and substantial evidence in view of the entire record as submitted.'" *Underwood v. Board of Alcoholic Control,* 278 N.C. 623, 629, 181 S.E. 2d 1, 5 (1971). Applying the "whole record" test in the present case, we find ample, competent, material, and substantial evidence to support the Board's factual finding that petitioner "did permit improper entertainment, conduct and practices" upon the licensed premises "by allowing dancing where the dancing girl exposed her pubic area to customers." We find impersuasive the petitioner's contention that there was no competent, material, and substantial evidence to show a violation of the Board's regulation which he was charged with violating, since that regulation prohibits exposure of "pubic hair" and does not expressly prohibit exposure of the "pubic area." The Board's regulations are not criminal statutes to be strictly construed. They are civil regulations to be reasonably interpreted so as to accomplish the legitimate purposes for which they are issued. Moreover, the Board's factual findings should be understood in the light of the evidence on which they are based. Here, the Board's factual finding that "the dancing girl exposed her pubic area to customers on the licensed premises" was supported by ample, competent, direct evidence. Interpreted in the light of that evidence, that finding shows a clear violation of the Board's regulation as reasonably construed. It also shows a violation of the statutory proscription against permitting on the licensed premises "improper entertainment, conduct, or practices."

[2] Petitioner contends that he should not be held responsible for the actions of his female employee in this case, pointing to his evidence that he attempted to exercise tight supervision over his waitresses. Petitioner, however, acts through his agents

and employees and is responsible for their conduct. *Boyd v. Allen,* 246 N.C. 150, 97 S.E. 2d 864 (1957); *American Legion v. Board of Alcoholic Control,* 27 N.C. App. 266, 218 S.E. 2d 513 (1975). Nothing in the present record indicates that the employee here involved acted suddenly or unexpectedly or in such a manner as to make it unfair to hold petitioner responsible for her conduct on the licensed premises.

Petitioner's remaining contentions have been duly considered. We find none of them persuasive.

The judgment of the Superior Court of Wake County affirming the decision of the Board of Alcoholic Control is

Affirmed.

Judges HEDRICK and ARNOLD concur.

JAMES C. PARSONS, PLAINTIFF v. ADRIAN F. BAILEY, T.F.C. LEASING CORPORATION, TRADE LEASING CORPORATION, AND LIBERTY FINANCIAL CORPORATION, DEFENDANTS

No. 7618DC184

(Filed 18 August 1976)

Master and Servant § 34— agent acting outside scope of authority — directed verdict for employer proper

In plaintiff's action against defendant as agent for T.F.C. Leasing Corp., Trade Leasing Corp. and Liberty Financial Corp. for damages allegedly arising out of an unfair or deceptive business practice, the trial court properly directed a verdict for Trade Leasing where the evidence tended to show that defendant was an agent of Trade Leasing at the time he was negotiating with plaintiff, but the contract signed by plaintiff and defendant which defrauded plaintiff of his money and the check given by plaintiff to defendant made payable to T.F.C. put plaintiff on notice that defendant was acting outside his scope of authority as the agent for Trade Leasing, but was instead acting on his own behalf or on behalf of T.F.C.

APPEAL by plaintiff from *Kuykendall, Judge.* Judgment entered 3 November 1975 in District Court, GUILFORD County. Heard in the Court of Appeals 7 June 1976.

This is a civil action wherein the plaintiff, James C. Parsons, is seeking damages allegedly arising out of an unfair or

deceptive business practice by the defendant, Adrian F. Bailey, as agent for the defendants T.F.C. Leasing Corporation, Trade Leasing Corporation and Liberty Financial Corporation. Plaintiff's amended complaint is summarized and quoted as follows:

Adrian F. Bailey was president of Trade Leasing Corporation (Trade Leasing), an employee of T.F.C. Leasing Corporation (T.F.C.), and an employee of Liberty Financial Corporation (Liberty) when, in the spring of 1973, he met with plaintiff to discuss the possibility of plaintiff becoming a licensed dealer for Trade Leasing. Bailey represented to plaintiff that Trade Leasing was a subsidiary of Liberty when plaintiff exhibited an interest in the dealership; so Bailey gave him a "kit" of information on Trade Leasing and Liberty. Bailey corresponded with plaintiff on Trade Leasing stationery and plaintiff called Bailey several times at the Trade Leasing office in Atlanta. Plaintiff also checked out the references of Trade Leasing and Liberty at Bailey's suggestion. When it appeared to plaintiff that everything was in order, he met with Bailey on 4 May 1973 to execute a licensing agreement with Trade Leasing. However, instead of the agreement being with Trade Leasing Corporation as shown on sample agreements given to plaintiff earlier, the agreement which the plaintiff actually signed was with T.F.C. Leasing Corporation.

Subsequent to the signing of the agreement, plaintiff learned that T.F.C. and Trade Leasing were different companies. Plaintiff sought the return of his $2,500.00 investment given to Bailey at the time the agreement was signed but has been unsuccessful.

"XIV. By his course of prior dealings, Adrian F. Bailey made definite and specific representations that by signing the license agreement, plaintiff was to become a licensed dealer of Trade Leasing Corporation. This was a material misrepresentation."

"XVI. The representations to the plaintiff that he was to become a licensed dealer of Trade Leasing Corporation were made by Adrian F. Bailey with knowledge of its falsity and with a fraudulent intent. The plaintiff reasonably relied upon the misrepresentations referred to above to his deception and damage. The aforesaid actions of the defendant were fraudulent and constituted unfair and

deceptive acts and practices within the meaning of North Carolina General Statutes Sec. 75-1.1."

"XVIII. All of the defendants are jointly and severally liable to the plaintiff under the doctrine of respondent superior for the plaintiff's damages caused by Adrian F. Bailey who was the agent of all of the corporate defendants during the times complained of herein and was acting within the scope of his authority for all of the defendant corporations."

The defendants Trade Leasing and Liberty filed an answer wherein they admitted that Bailey was the president and employee of Trade Leasing but denied that he was an employee of Liberty. They also denied that at the time of the alleged fraudulent misrepresentation Bailey was acting as the agent of either corporation.

Neither Bailey nor T.F.C. filed an answer. On 28 October 1975 there was an entry of default against Bailey and T.F.C.

The case came on to be heard before the jury in district court. At the end of plaintiff's evidence, Trade Leasing and Liberty moved for a directed verdict. The court allowed the defendants' motions, directing a verdict for the defendants, Trade Leasing and Liberty. The issue of damages was submitted to the jury who returned a verdict against Bailey and T.F.C. in the amount of $2,854.00. Pursuant to G.S. 75-1.1 and G.S. 75-16, Judge Kuykendall awarded treble damages, $8,562.00 and an attorney's fee of $1,500.00. Plaintiff appealed.

Clark, Tanner, Williams and Sharp by Eugene S. Tanner, Jr. for plaintiff appellant.

No counsel for defendant appellees, Trade Leasing and Liberty.

No counsel for defendants Bailey and T.F.C.

HEDRICK, Judge.

Plaintiff assigns as error the granting of Trade Leasing's and Liberty's motions for a directed verdict. The pertinent evidence offered at trial by plainitff is summarized as follows:

Liberty owned 100% of the stock in L.F.C. Realty Corporation. L.F.C. Realty owned 70% of the stock in Trade Leas-

ing and Bailey owned the other 30%. James Johnson, as executive Vice-President of Trade Leasing entered into a contract with Bailey wherein Bailey became President and Sales Manager of Trade Leasing. Johnson was also executive Vice-President of Liberty and President of L.F.C. Realty.

Subsequent to the signing of the contract between Bailey and Trade Leasing, Bailey began marketing a franchise dealership in North Carolina which was purchased by Fred Bunge. In the spring of 1973, at approximately the same time Bailey was negotiating with Bunge, the plaintiff saw an advertisement in the newspaper for an opportunity to enter into a leasing franchise. In response to the ad, he called the defendant Bailey who was staying at a motel in Greensboro. Bailey was on the way out of town, but he agreed to leave a "packet" of information regarding the leasing franchise opportunity at the motel desk, which information the plaintiff picked up. This packet was introduced into evidence. Contained in the packet were financial references for Trade Leasing and Liberty, a sample contract of a franchising agreement with Trade Leasing listing Trade Leasing as a subsidiary of Liberty, a financial statement of Liberty, and other miscellaneous items. Throughout the packet there appears "TLC," "LFC," used in abbreviation of the corporations, and "The Trade Leasing Corporation, hereafter referred to as Trade" appears in the preamble to the sample contract.

Plaintiff contacted Bailey again and Bailey told him he was an agent for Trade Leasing. Bailey flew up from Atlanta and, together, he and plaintiff discussed the leasing franchise. Plaintiff was told the franchise was to secure contracts for Trade Leasing wherein Trade Leasing would lease equipment to the agreeing party. After talking with Bailey, plaintiff checked out the references listed in the "packet" and received a favorable response as to the financial situation of Trade Leasing and Liberty.

Subsequently, plaintiff entered into "a license agreement," the first paragraph of which reads in part:

> "Agreement made this 4th day of May, 1973, between TFC Corporation (hereinafter referred to as Trade) . . . . "

The agreement was executed by Bailey. When plaintiff signed the agreement, he gave Bailey a cashier's check made payable

to TFC Leasing Corporation. At the time plaintiff entered into the contract, he had read it over carefully including the first paragraph. He saw that it said TFC Corporation. He also directed the bank to draw the check to TFC Leasing Corporation. He "assumed," however, that "it was the original name or the true name of the parent company" and that "it was all part of the same organization," since Bailey had represented to plaintiff that he was signing a Trade Leasing contract.

Approximately a month after signing the agreement, he learned that Bunge already had the franchise dealership in North Carolina. Plaintiff called Bailey and was informed that TFC and Trade Leasing were different companies, but that "the backing [was] the same." Plaintiff asked for his money back but was unsuccessful. Eventually he was unable to even contact Bailey.

Sam Johnson testified that acting in his capacity as Executive Vice-President of L.F.C. Realty, he had fired Bailey.

Because plaintiff alleged and now contends that Liberty was the parent company of Trade Leasing and derived its liability from the close relationship of the two corporations and from the active involvement of Liberty in the affairs of Trade Leasing, it is clear that Liberty will be liable only if it is first determined that Trade Leasing is liable. Accordingly, we limit consideration of this assignment of error to the question of whether the trial court erred in granting a directed verdict for Trade Leasing. We hold that it did not.

> "The general rule is that a principal is responsible to third parties for injuries resulting from the fraud of his agent committed during the existence of the agency and within the scope of the agent's actual or apparent authority from the principal, even though the principal did not know or authorize the commission of the fraudulent acts (citations omitted)." *Norburn v. Mackie,* 262 N.C. 16, 23, 136 S.E. 2d 279, 284-285 (1964).

Thrower v. Dairy Products, 249 N.C. 109, 105 S.E. 2d 428 (1958).

It makes no difference that the agent was acting in his own behalf and not in the interests of the principal when the fraudu-

lent act was prepetrated *unless* the third parties had notice of that fact. Restatement (Second) of Agency, § 262.

> "It would seem to be clear that if the agent is purporting to act as an agent and doing the things which such agents normally do, and the third person has no reason to know that the agent is acting on his own account, the principal should be liable because he has invited third persons to deal with the agent within the limits of what, to such third persons, would seem to be the agent's authority. To go beyond this, however, and to permit the third persons to recover in every case where the agent takes advantage of the standing and position of his principal to perpetuate a fraud would seem to be going too far." Restatement (Second) of Agency § 261, Reporter's Notes.

In the present case, there seems to be sufficient evidence to support a finding that Bailey was an agent of Trade Leasing at the time he was negotiating with plaintiff. Plaintiff's case against Trade Leasing must fail, however, because there is no evidence in this record to support a finding that he was acting within the scope of authority of such agency when he was negotiating with the plaintiff. Indeed, plaintiff's own evidence affirmatively discloses that Bailey was acting in his own behalf, or in behalf of T.F.C., or both, in his negotiations with plaintiff. The very contract signed by plaintiff and Bailey which defrauded plaintfif of his $2,500.00 and the very check given by plaintiff to Bailey made payable to T.F.C. show conclusively, as a matter of law, that plaintiff had notice that Bailey was not acting as the agent for Trade Leasing. The court properly directed a verdict for the defendants, Trade Leasing and Liberty.

In light of our holding in the assignment of error discussed above, it is not necessary that we discuss plaintiff's other assignments of error relating to the exclusion of evidence.

The judgment appealed from is affirmed.

Affirmed.

Judges PARKER and ARNOLD concur.

HYDE INSURANCE AGENCY, INC. v. HOMER RANDOLPH NOLAND

No. 7630DC50

(Filed 18 August 1976)

Insurance § 2— open account with insurance agent — finance or late payment charge permissible

G.S. 24-11(a) and G.S. 58-56.1(c) authorize an insurance agent who extends customer credit on an open account to impose a finance charge on his own customers in an amount not to exceed an aggregate annual rate of 18%, even though there has not been any prior express agreement between the parties regarding such charges, but such charges may not be imposed unless the debtor is given proper notice that the creditor intends to impose such finance charges; therefore, the trial court erred in concluding that plaintiff could not impose late charges or finance charges in any amount on any portion of the overdue credit balance on defendant's open account with plaintiff.

APPEAL by plaintiff from *Leatherwood, Judge.* Judgment entered 3 October 1975 in District Court, Haywood County. Heard in Court of Appeals 6 May 1976.

This is a civil action, wherein the plaintiff, Hyde Insurance Agency, Inc., seeks to recover from defendant, Homer Randolph Noland, insurance premiums due on an open account and "late charges or finance charges" due on said account.

The parties waived trial by jury and submitted the action to the Court on an agreed statement of facts from which the Court made the following findings and conclusions:

"1. Plaintiff's account shows a balance owing them by the Defendant for insurance premiums in the total amount of $352.94.

"2. Plaintiff's account shows a balance owing them by the Defendant for late charges or finance charges imposed from time to time at the periodic rate of 1% per month or an annual percentage rate of 12%, on any balance owing Plaintiff over 30 days old after deducting current payments and credits shown, in the total amount of $441.19.

"3. Defendant has made no actual oral or written agreement to pay finance charges or late charges in any amount or at any rate.

"4. Plaintiff has mailed monthly to the Defendant a 'Statement' of defendant's account with a separate entry

for each late charge and each separate transaction; on the face of each such 'Statement' is the following written material:

"Late Charge (FINANCE CHARGE) at the periodic rate of 1% per month (ANNUAL PERCENTAGE RATE—12%) is imposed on balance over 30 days old after deducting current payments and credits shown. To avoid late charge (FINANCE CHARGE) pay current charges within 30 days from closing date.

"On the reverse side of each 'Statement' is the following written material:

"NOTICE

All accounts are due and payable upon receipt of statement, and the imposition, payment or collection of a late charge shall in no way represent or be deemed to be a grant or extension of time for payment of the account, or interest for the financing of premiums, the late charge is not part of any insurance premium, and the payment or nonpayment of the late charge shall in no way affect the lapse as reinstatement of any policy, or alter the terms or conditions of any policy. The information furnished on this statement with regard to finance charge is given to comply with the Federal Truth-In-Lending Act.

"5. The Defendant has received these 'Statements' from the Plaintiff.

"6. Defendant has made no payments to Plaintiffs on said account since prior to December 10, 1974, the date of the institution of the suit, the last payment having been made on September 4, 1973.

"BASED UPON THE ABOVE FINDINGS OF FACT, and after hearing the oral arguments of Counsel for each party as to the applicable law, the Court makes the following CONCLUSIONS OF LAW:

"1. Plaintiff is entitled to recover from the Defendant $352.94 for insurance premiums owed them.

"2. Plaintiff is not entitled to recover for any late charges or finance charges imposed on Defendant's account balance."

From the Judgment that the plaintiff recover $352.94 for delinquent premiums, and that it recover no finance charges, plaintiff appealed.

Millar, Alley & Killian, by Leon M. Killian III, for the plaintiff appellant.

Francis & Hipps, by Charles W. Hipps, for defendant appellee.

HEDRICK, Judge.

Plaintiff excepted to the following conclusion by the Court, "Plaintiff is not entitled to recover for any late charges or finance charges imposed on Defendant's account balance." This exception presents for review the question of whether the facts found by the trial judge support such a conclusion. Defendant argues that the conclusion is supported by the finding, "Defendant has made no actual oral or written agreement to pay finance charges or late charges in any amount or at any rate."

The record before us clearly demonstrates that the defendant purchased insurance through plaintiff's agency from time to time on "open-end credit" or an open account beginning in August, 1968, through April, 1973. On 25 May 1970, when defendant's account balance was $415.00, plaintiff began to impose a "late charge or finance charge" on defendant's credit balance more than 30 days old. The record further discloses and the Court found as a fact, that the monthly bills sent to the defendant by the plaintiff, disclosed that the plaintiff was charging the defendant a "finance charge of 1½% monthly or 18% annually. The finance charge was reduced to 1% monthly or 12% annually in September, 1973.

General Statute 24-11(a) provides, in part:

> "On the extension of credit under an open-end credit or similar plan . . . under which no service charge shall be imposed upon the consumer or creditor if the account is paid within twenty-five days from the billing date, there may be charge and collected interest, finance charges or other fees at a rate in the aggregate not to exceed one and one-half percent (1½%) per month on the unpaid balance of the previous month. . . ."

General Statute 58-56.1(c) provides, in part:

> ". . . an insurance broker duly licensed in this State who extends credit to and only to his own policyholders may charge and collect finance charges or other fees at a periodic (monthly) rate as provided in G.S. 24-11(a), after said amount has been outstanding for 30 days. . . ."

We interpret these statutes to authorize an insurance agent who extends customer credit on an open account to impose a finance charge on his own customers in an amount not to exceed an aggregate annual rate of 18%. We think that it was the intention of the Legislature to authorize the imposition of finance charges on an open account, even though there had not been any prior express agreement between the parties regarding such charges. However, such charges could not be imposed unless the debtor was given proper notice that the creditor intended to impose such finance charges. We think the creditor could collect a finance charge on an open account under the provisions of G.S. 24-11(a) provided the person to whom the credit is extended had been notified by the creditor when the credit was extended of all the details and circumstances pertaining to the imposition of finance charges. Thus we hold the Court's conclusion that the plaintiff could not impose "late charges or finance charges" in any amount on any portion of the overdue credit balance to be erroneous and not supported by the findings of fact.

In the absence of evidence tending to show that the plaintiff notified the defendant of the details and circumstances under which it proposed to institute finance charges prior to 25 May 1970, we hold the plaintiff would not be entitled to impose finance charges on the credit balance existing at that time. However, it is our opinion, that since the statements received by defendant after that date contained detailed information regarding the imposition of finance charges, the plaintiff would be entitled to impose finance charges under G.S. 24-11(a) on all credit extended on purchases made after that date.

Since the Court concluded that the plaintiff was not entitled to recover finance charges, it did not make definitive findings of fact sufficient to determine the precise amount, if any, the plaintiff might be entitled to recover as finance charges. Indeed, we cannot say that the parties sufficiently developed the evidence to enable the Court to make definitive findings.

That portion of the judgment awarding the plaintiff $352.94 representing delinquent insurance premiums is affirmed. For the reasons stated above, that portion of the judgment declaring plaintiff is not entitled to recover any amount for "late charges or finance charges" is vacated and the cause is remanded to the District Court for a new trial as to plaintiff's claim to recover $441.19 in finance charges.

Affirmed in part, vacated and remanded in part.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. THURSTON GREENE AND JOHNNY PRESNELL

No. 7625SC114

(Filed 18 August 1976)

1. **Criminal Law § 92— defendants charged with same crime — consolidation proper**

Prosecutions against two defendants for felonious breaking and entering and larceny were properly consolidated where defendants were charged with committing identical offenses at the same time and place.

2. **Criminal Law § 90— no cross-examination of State's own witness**

Defendants were not prejudiced by the trial court's ruling that the prosecution might cross-examine the State's own witness, since the court reversed its own ruling before any cross-examination took place.

3. **Criminal Law § 80— written statements read by witness — memory refreshed**

There was no error in the trial court's action directing a State's witness, out of the presence of the jury, to read two statements, one of which he himself had written while in jail and the other of which was a typewritten summary of statements made by the witness at a conference between the witness and the private prosecutor in the presence of a deputy sheriff, since a witness may be compelled by counsel to inspect a writing which is present in court if it is in his handwriting or it otherwise appears that his memory may be refreshed by reading it.

4. **Criminal Law § 73— overheard conversations — no hearsay evidence**

Admission of testimony by a State's witness concerning two conversations he overheard between one defendant and two other people

did not violate the rule barring hearsay testimony, since the testimony was offered to show that the conversations took place, not to establish the truth of any statements made in the course of the conversations.

5. Burglary and Unlawful Breakings § 5; Larceny § 7— house broken into — defendants in possession of recently stolen items — sufficiency of evidence

In a prosecution for breaking and entering and larceny evidence was sufficient for the jury where it tended to show that a house was broken into and that defendants were in possession of items taken from the house no longer than several weeks after the theft.

ON *writ of certiorari* to review proceedings before *Baley, Judge*. Judgements entered 11 July 1975 in Superior Court, BURKE County. Heard in the Court of Appeals 13 May 1976.

By separate indictments, identical except for the name of the accused, the defendants Greene and Presnell were charged with (1) feloniously breaking and entering the Cuthbertson home in Burke County on or about 23 August 1974, and (2) the larceny therefrom after such breaking and entering of various items of personal property, including three rifles, forty cases of Remington .22 calibre Cherokee Shooting Gallery rifle shells, two television sets, and four cases of steel animal traps. The cases were consolidated for trial and both defendants pled not guilty.

The State presented evidence that on 23 August 1974 Mr. and Mrs. Cuthbertson returned to their home after being gone for several weeks to find it had been broken into and the items of personal property described in the indictments were missing therefrom. On 25 August 1974 the officers searched Greene's home under authority of a search warrant and found in the basement one television set and four cases of steel traps, which were identified by Mr. Cuthbertson as included among the items taken from his home. The State's witness George Tebbetts testified that on 20 or 21 August 1974 defendant Presnell sold him a rifle and two cases of ammunition, which were also identified by Cuthbertson as property taken from his home. Five witnesses for the State, Hildebran, Shook, Boyd, Scott, and Walker, testified to purchasing from defendant Presnell in separate transactions in late August 1974 cases of ammunition identified by Cuthbertson as his property taken from his home. Each case contained 10,000 rounds of a special gallery type ammunition which Cuthbertson specially ordered from Remington Arms Company for use in shooting galleries operated by him on the

Indian Reservation at Cherokee. This ammunition is made specially for gallery type shooting and has a special splatterless type shell required by the insurance company. Cuthbertson's invoice number was on these cases of ammunition.

Defendants did not present evidence. The jury found each defendant guilty of the charges contained in the indictments. From judgments imposing prison sentences, each defendant appealed. To perfect the appeals this Court allowed appellants' petition for certiorari.

Attorney General Edmisten by Assistant Attorney General Charles J. Murray for the State.

Hatcher, Sitton, Powell & Settlemyer, P.A. by Claude S. Sitten for defendant appellants.

PARKER, Judge.

[1] There was no error in consolidating the cases for trial. The defendants were charged with committing identical offenses at the same time and place. Whether defendants so charged should be jointly or separately tried is within the sound discretion of the trial court, and in the absence of a showing that a joint trial deprived a defendant of a fair trial, the exercise of the court's discretion will not be disturbed on appeal. *State v. Jones,* 280 N.C. 322, 185 S.E. 2d 858 (1972). No such showing was made. That certain of the evidence against each defendant was inadmissible against the other did not deprive either of a fair trial. In each instance the trial judge correctly instructed the jury as against which defendant the particular evidence was competent, and nothing in the record indicates that the jury was not able to follow his clear instructions. No evidence was introduced to show any out-of-court statement by either defendant implicating the other, and the problem involved in *Bruton v. United States,* 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), is not here presented. *State v. Dyer,* 239 N.C. 713, 80 S.E. 2d 769 (1954), cited by appellants, is not applicable to the facts of the present case. In that case defendants were charged with separate offenses of the same class, receiving stolen goods, but the offenses were committed at different times and places and under different circumstances. Here, the defendants were charged with committing the identical offenses at the same time and place.

The questions raised by appellants' second, third, and fourth assignments of error are not presented and discussed in their brief and are deemed abandoned. Rule 28(a), North Carolina Rules of Appellate Procedure.

[2, 3] In their fifth assignment of error appellants assert that the court erred in ruling that the prosecution might cross-examine the State's own witness, Ricky Puett. Appellants suffered no prejudice by this ruling, since the trial court reversed its own ruling before any cross-examination took place. There was also no error in the court's action directing this witness, out of the presence of the jury, to read two statements, one of which he had himself written while in jail on 31 August 1974 and the other of which was a typewritten summary of statements made by the witness at a conference held 23 September 1974 between the witness and the private prosecutor in the presence of a deputy sheriff. These statements related to events concerning which the witness had been questioned by the prosecution at defendants' trial and as to which his answers, either because of a fading memory or by deliberate intent, had been extremely vague. "A witness may be compelled, at the instance of counsel examining or cross-examining him, to inspect a writing which is present in court, if it is his handwriting or it otherwise appears that his memory may be refreshed by reading it." 1 Stansbury's N. C. Evidence, Brandis Revision, § 32, p. 88. Appellants' fifth assignment of error is overruled.

[4] By their sixth assignment of error the appellants contend that the court erred in permitting the State's witness, Puett, to testify concerning two conversations which he overheard. One of these was between defendant Presnell and an unidentified man and the other was between Presnell and the witness's uncle. Both conversations related to a television set. Admission of this testimony did not violate the rule barring hearsay testimony. The testimony was offered to show that the conversations took place, not to establish the truth of any statements made in the course of the conversations. Moreover, Puett's testimony concerning these conversations was admitted by the court only against defendant Presnell, not against defendant Greene, and the statements attributed to Presnell would in any event be admissible against him. Appellants' sixth assignment of error is overruled.

[5] Finally, appellants contend their motions for nonsuit should have been allowed. We do not agree. There was ample

evidence to show that someone broke into the Cuthbertson home and removed therefrom a large amount of property. There was also evidence that not long after this occurred the defendants Greene and Presnell were each in possession of articles of property taken from the Cuthbertson home. A defendant's possession of stolen goods soon after the theft is a circumstance tending to show him guilty of the larceny. His failure to explain how the stolen articles came into his possession does not compel a conviction, but in the absence of an explanation or of a showing of circumstances such as to destroy the basis for the inference, evidence of such possession is sufficient to justify denial of a motion for nonsuit on the charge of larceny. *State v. Eppley,* 282 N.C. 249, 192 S.E. 2d 441 (1972). Upon proof of larceny following a breaking and entering, the defendant's possession of the stolen articles under such circumstances will also support an inference that he committed the breaking and entering. *State v. Jackson,* 274 N.C. 594, 164 S.E. 2d 369 (1968); *State v. Blackmon,* 6 N.C. App. 66, 169 S.E. 2d 472 (1969). Appellants contend, however, that these inferences should not be permitted in the present case because the State's evidence does not show exactly when the breaking and entering of the Cuthbertson home occurred and therefore the State has failed to show exactly how soon after that event it was that defendants were found in possession of the stolen articles. We do not agree. The Cuthbertsons testified that they returned to find their home broken into after being gone for "several weeks." The factual presumption, that one found in the unexplained possession of recently stolen property is the thief, is strong or weak depending on the circumstances, only one of which is the time between the theft and the possession. Other circumstances are the type of property involved and its legitimate availability in the community. *State v. Raynes,* 272 N.C. 488, 158 S.E. 2d 351 (1968); *State v. Blackmon, supra.* Here, the defendant Greene was shown to be in possession, at least no longer than "several weeks" after the theft, of a stolen television set and four cases of steel animal traps, an unusual combination of items not normally available, at least in that combination, through legitimate channels in the community. Defendant Presnell was shown to be in possession of one of the stolen rifles and of at least five cases, each containing 10,000 rounds, of specially manufactured ammunition, again property not normally available through legitimate channels in the com-

munity. Under these circumstances the jury could legitimately draw the inferences above referred to.

In defendants' trial and in the judgments imposed, we find

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. RUDOLPH VALENTINO MARTIN

No. 7626SC150

(Filed 18 August 1976)

1. **Forgery § 2— signatures written without authority — insufficiency of evidence**

The trial court should have allowed defendant's motion for nonsuit as to the charge of forgery against him where the State failed to present any evidence to show that the signatures which defendant was charged with forging were signed by him without authority.

2. **Insurance § 77— auto allegedly stolen — false claim presented — sufficiency of evidence**

Defendant's motion for nonsuit on a charge of presenting a false insurance claim was properly overruled where the evidence would support a jury finding that an automobile on which defendant obtained an insurance policy and for loss of which he presented a claim under the policy had been destroyed by fire several months before the policy was issued and was not in existence on the date defendant reported it was stolen from him.

3. **Insurance § 77— false claim presented to insurance company — jury instructions inadequate**

In a prosecution of defendant for presenting a false insurance claim, the trial court erred in failing to instruct the jury in sufficiently specific terms what facts, if found by them from the evidence given in the case, would warrant a verdict finding defendant guilty of the offense set forth in the indictment.

APPEAL by defendant from *Kirby, Judge.* Judgments entered 3 December 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 26 May 1976.

By bill of indictment returned as a true bill on 3 February 1975, defendant was charged with feloniously forging a bill of

sale dated 10 July 1974 for a Cadillac automobile "by forging the name of Claude E. Rogers, a notary, and the name of Jack M. Jones . . . without authority and with deceit and the intent to injure and defraud."

By a separate bill of indictment returned as a true bill on 1 December 1975, defendant was charged with feloniously presenting a false and fraudulent claim and proof in support of such claim for payment of benefits under an insurance policy by reporting the Cadillac automobile No. 6L47S4Q406460 as having been stolen on 21 October 1974.

Defendant pled not guilty to both charges. The cases were consolidated for trial. The State presented evidence to show that on 8 October 1974 defendant obtained a policy of insurance covering a 1974 Cadillac automobile, serial No. 6L47S4Q406460, providing coverage for the period from 17 September 1974 to 16 September 1975; that on 7 November 1974 defendant reported to the claims agent for the insurance company that the Cadillac had been stolen on 21 October 1974; and that later in November 1974 defendant filed a proof of loss together with a bill of sale dated 10 July 1974 purporting to show transfer of title to the Cadillac to the defendant for the sales price of $9,850.00. Two employees of the South Carolina Highway Department testified that on 26 February 1974 they examined a Cadillac bearing serial number 6L47S4Q406460 on the premises of the Insurance Salvage Sales Company in Taylors, South Carolina, and that the car had been "totally burned." Other evidence for the State indicated that the burned Cadillac was subsequently junked.

Claude Rogers, called as a witness for the State, testified he was a notary public for the State of South Carolina, and the signature "Notary, Claude R. Rogers" at the bottom of the bill of sale was not his signature. On cross-examination he testified that he had known defendant for 20 to 25 years and at one time had been in business with the defendant, and that in late 1974 defendant phoned him from Myrtle Beach and said he needed to replace a bill of sale that had been lost. Rogers testified: "He called me in late 1974 from Myrtle Beach relative to this bill of sale, and I gave him authority to sign my name."

Defendant testified that he purchased the burned Cadillac and later rebuilt it, that on 21 October 1974 the rebuilt car

was stolen from him, that the original bill of sale was in the dash of the car when it was stolen, that in November 1974 he prepared a duplicate of the bill of sale because the insurance company told him to get one before they would process the claim, and that he signed the names of Jones and Rogers on the bill of sale after obtaining authority from those persons to do so.

The jury found defendant guilty of both charges, and from judgments imposing prison sentences, he appealed.

Attorney General Edmisten by Associate Attorney Joan H. Byers for the State.

Kenneth W. Parsons for defendant appellant.

PARKER, Judge.

[1] In the indictment returned as a true bill on 3 February 1975, defendant was charged with forging a bill of sale "by forging the name of Claude R. Rogers, a notary, and the name of Jack M. Jones." Defendant admitted that he signed the names of both of these persons to the bill of sale, but testified he did so by their authority. "To show that the defendant signed the name of some other person to an instrument, and that he passed such instrument as genuine, is not sufficient to establish the commission of a crime. It must still be shown that it was a false instrument, and this is not established until it is shown that the person who signed another's name did so without authority." *State v. Dixon,* 185 N.C. 727, 731, 117 S.E. 170, 172 (1923). Here, the State presented no evidence regarding the identity of or want of authority from Jones. "Where defendant signs the name of another person to an instrument, there is no presumption of want of authority." *State v. Phillips,* 256 N.C. 445, 448, 124 S.E. 2d 146, 148 (1962). Rogers, called as a witness for the State, testified that he expressly authorized defendant to sign his name to the bill of sale. There was no evidence to the contrary. For failure of the State to present any evidence to show that the signatures which defendant was charged with forging were signed by him without authority, the defendant's motion for nonsuit as to the charge of forgery should have been allowed.

[2] As to the other case, in which defendant was charged with violating G.S. 14-214 by presenting a false and fraudulent

insurance claim by reporting the Cadillac as having been stolen on 21 October 1974, there was sufficient evidence to require submission of the case to the jury. The evidence, when viewed in the light most favorable to the State, would support a jury finding that the automobile, on which defendant obtained the insurance policy and for loss of which he presented a claim under the policy, had been destroyed by fire several months before the policy was issued and was not in existence on the date defendant reported it was stolen from him. Such a finding by the jury would, of course, compel the further finding that defendant was guilty of the exact offense charged in the bill of indictment, i.e., the presenting of a false and fraudulent claim for the payment of a loss and other benefits upon the contract of insurance *"by reporting a 1974 Cadillac Eldorado, two door hardtop, Vehicle Identification Number 6L47S4Q406460 as being stolen on October 21, 1974."* (Emphasis added.) Defendant's testimony that he rebuilt the car and that it was in actual existence on the date he reported it to have been stolen, was for the jury to evaluate. Defendant's motion for nonsuit on the charge of presenting a false insurance claim was properly overruled.

[3] However, for failure of the court to "declare and explain the law arising on the evidence given in the case," as required by G.S. 1-180, defendant is entitled to a new trial in the case in which he was charged with presenting a false insurance claim. In this connection, the court did instruct the jury correctly, but in general terms, concerning the elements of the offense. However, the court failed to instruct the jury in sufficiently specific terms what facts, if found by them from the evidence given in the case, would warrant a verdict finding defendant guilty *of the offense set forth in the indictment.* This was important in this case, since, under the charge as given by the court, the jury might have found defendant guilty of making a false and fraudulent claim on the insurance policy, not by falsely reporting the Cadillac automobile as being stolen, but by presenting a false bill of sale to show his ownership of the Cadillac. The bill of indictment set forth in specific terms the manner in which defendant allegedly committed the offense, and it was incumbent on the State to prove the charge as contained in the indictment. As above noted, the State's evidence was sufficient for that purpose. However, under the court's charge to the jury it would have been possible for the jury to

return a verdict of guilty, not because it found that defendant had presented a fraudulent claim by falsely reporting the car as being stolen, which is the offense charged in the indictments, but because it found that defendant presented to the insurance company a false bill of sale.

The result is:

In the case in which defendant was charged with forgery, there was error in failing to grant his motion for nonsuit, and the judgment imposed in that case is vacated.

In the case in which defendant is charged with presenting a false insurance claim, defendant is entitled to a

New trial.

Judges HEDRICK and ARNOLD concur.

FRANKLIN DELANO OVERMAN, PLAINTIFF, v. GIBSON PRODUCTS COMPANY OF THOMASVILLE, INC., D/B/A GIBSON'S DISCOUNT STORE, AND JERRY LEE THOMAS, DEFENDANTS AND THIRD PARTY PLAINTIFFS, v. FRANKLIN MONROE OVERMAN, C. T. GOFORTH, AND T. L. ARNEY, THIRD PARTY DEFENDANTS

No. 7621SC250

(Filed 18 August 1976)

Rules of Civil Procedure § 50— motion for directed verdict — ruling based on plaintiff's evidence only — error

When a defendant moves for directed verdict at the close of plaintiff's evidence, the trial judge can either not rule or reserve his ruling, but if the defendant thereafter offers evidence, any subsequent ruling by the trial judge upon defendant's motion for directed verdict must be upon a renewal of the motion by defendant at the close of all the evidence, and the judge's ruling must be based upon the evidence of both plaintiff and defendant; therefore, the trial court in this action for malicious prosecution erred in reserving his ruling upon defendants' motions for directed verdict made at the close of plaintiff's evidence until the close of defendants' evidence, and then ruling upon only the evidence as offered up until the time the motions were made.

APPEAL by plaintiff from *Long, Judge*. Judgment entered 9 December 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 16 June 1976.

This is an action for damages, compensatory and exemplary, for alleged malicious prosecution. On 19 December 1974 default was entered against third party defendant Franklin Monroe Overman. On 3 December 1975 summary judgment was entered in favor of third party defendant C. T. Goforth. On 4 December 1975 a directed verdict was entered in favor of third party defendant T. L. Arney. There has been no exception taken to the entry of any of the above three orders. Therefore, this appeal involves only the plaintiff and the original defendants.

Facts necessary for an understanding of the question raised on this appeal are set forth in the opinion.

Schoch, Schoch, Schoch and Schoch, by Arch Schoch, Jr., for the plaintiff.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and William C. Raper, for the original defendants.

BROCK, Chief Judge.

The case was called for trial during the 1 December 1975 session of Superior Court, Forsyth County. The plaintiff completed the presentation of his evidence during the afternoon of 3 December 1975. When plaintiff rested, the original defendants moved for directed verdicts. The trial judge excused the jury until the following morning and heard arguments upon the original defendants' motions. No ruling was made. After court reconvened the morning of 4 December 1975, the trial judge allowed the original defendants' motions for directed verdicts on the issue of punitive damages; however, he reserved ruling on the original defendant's motions for directed verdicts as to the entire cause of action in the following words: "I intend to rule upon the evidence as offered up until the time the motion was made."

Thereafter the jury returned to the courtroom, and the original defendants offered all of their evidence. When the original defendants rested on 4 December 1975, the trial judge again excused the jury for the day to return the morning of 5 December 1975. Before court was recessed for the day on 4 December 1975, the trial judge, by an order entered 4 December 1975, allowed the motion of the third party defendant T. L. Arney for a directed verdict.

Upon the convening of court on 5 December 1975 the trial judge announced that he was ready to rule on the original defendants' motions for directed verdicts made at the close of plaintiff's evidence. The trial judge granted defendants' motions for directed verdicts by stating that he "is now ready to rule upon the motions for directed verdicts made by the defendants at the close of the plaintiff's evidence, and the Court will grant those motions."

Plaintiff's proposed record on appeal contained a narration of defendants' evidence. Upon objection by defendants, the trial judge ordered that defendants' evidence should be deleted from the record on appeal and the following inserted in lieu thereof:

> "Now, therefore, it is ORDERED that the evidence to be carried forward in the record on appeal shall consist of the plaintiff's evidence only, and the defendants' evidence in plaintiff's proposed record on appeal (beginning on page 84 and ending on page 103 thereof) shall be deleted from the record on appeal. In lieu thereof, the following statement shall be inserted in the record on appeal at the conclusion of the plaintiff's evidence and following the proceedings on motions ending on page 83:
>
> " 'The Court reserved its ruling on defendants' motion for directed verdict so that the judge might have extensive testimony reread to him by the court reporter after the jury had recessed for the evening. The defendants then offered evidence. At the conclusion of all the evidence, the Court recessed for the evening. Upon the reconvening of court the following morning, the Court announced it was ready to rule upon the defendants' motion for directed verdict made at the close of the plaintiff's evidence, and then granted such motion.'
>
> "It is further ORDERED that the index in plaintiff's proposed record on appeal be modified to delete any reference to defendants' evidence."

The procedure followed by the trial judge in this case effectively frustrates the policy and purpose of G.S. 1A-1, Rule 50. We have held that by offering evidence, a defendant waives his Rule 50 motion for directed verdict made at the close of plaintiff's evidence. *Woodard v. Marshall*, 14 N.C. App. 67, 187 S.E. 2d 430 (1972). This provision for waiver is necessary for

the orderly conduct of a trial. The same rule applied prior to the adoption of our present Rules of Civil Procedure. Former G.S. 1-183 (repealed upon the effective date of our present rules) provided that by offering evidence, a defendant waived his motion for nonsuit made at the close of the plaintiff's evidence. With respect to the federal court's counterpart of our Rule 50, it is said:

> "Technically a party waives his right to a directed verdict, if the motion is made at the close of his opponent's case, and thereafter he introduces evidence in his own behalf. However he may renew the motion at the close of all the evidence. If the party fails to renew the motion he may not move for judgment notwithstanding the verdict nor may he claim error on appeal from denial of the motion at the close of the opponent's evidence. The renewed motion will be judged in the light of the case as it stands at that time. Even though the court may have erred in denying the initial motion, this error is cured if subsequent testimony on behalf of the moving party repairs the defects of his opponent's case." Wright & Miller, Federal Practice and Procedure: Civil § 2534.

The procedure followed by the trial judge in this case effectively negates the designed use of a judgment notwithstanding the verdict as provided by Rule 50(b). The following comments by Dean Dickson Phillips illustrate the point:

> "The motion can be first made at the close of the evidence offered by an opponent. If it is then denied, the movant may introduce his own evidence—without expressly reserving the right to do so. He may then renew the motion. If he does not renew the motion at the conclusion of all the evidence, he is deemed to have waived any objection he may have had to its denial. Furthermore, he must in such circumstances renew the motion in order to lay the basis for a post-verdict motion for judgment n.o.v. He may defer making the motion for the first time until the conclusion of all the evidence." 2 McIntosh, N. C. Practice and Procedure, § 1488.10.

> "When a motion for directed verdict is made by defendant at the conclusion of plaintiff's evidence, it is frequently wise to defer decision pending receipt of defendant's evidence. Even when made at the conclusion of all the

> evidence, there are compelling reasons for deferring decision until after jury verdict if the trial judge considers that the question of sufficiency is a close one. In a close case where the trial judge is inclined to direct verdict against plaintiff an appeal by [plaintiff] is almost inevitable and reversal always a reasonable possibility. If he does direct verdict and this is reversed on appeal, there must then be a new trial at which plaintiff will have to re-establish his case de novo. On the other hand, if the case is allowed to go to the jury a much more effective disposition of the litigation is possible. If the jury finds for the defendant, the trial judge need make no legal determination of the suffeiciency of the evidence, thus avoiding the need for any review of this close question. If after verdict for plaintiff the judge rules against him on the 'reserved' directed verdict motion and this is then reversed on appeal, no new trial is needed; the original verdict may be reinstated to allow judgment for plaintiff." 2 McIntosh, N. C. Practice and Procedure, § 1488.35.

Obviously the trial judge can either not rule or reserve his ruling when a defendant moves for directed verdict at the close of plaintiff's evidence. However, if thereafter the defendant offers evidence, any subsequent ruling by the trial judge upon defendant's motion for directed verdict must be upon a renewal of the motion by defendant at the close of all the evidence, and the judge's ruling must be based upon the evidence of both plaintiff and defendant. The search for substantial justice and fair play dictates that a judge's ruling upon a motion for directed verdict should be made upon all of the evidence before him. Certainly a plaintiff is entitled to the benefit of evidence favorable to plaintiff that may be offered by a defendant or brought out by cross-examination of defendant's witnesses. The purpose of litigation is to seek the truth as best as that can be done.

We do not ascribe to the trial judge's procedure any motive except to expedite the litigation before him. We cannot determine whether defendants' evidence in this case would repair defects in plaintiff's case because that evidence is not before us. The point is that a defendant's evidence and witnesses may supply defects in a plaintiff's case, and when such evidence is before the judge, it should be considered. The trial judge's ef-

fort to expedite this case by improper procedure has obtained the opposite result.

It is not necessary for us to undertake a determination of whether plaintiff's evidence, standing alone, was sufficient to withstand a motion for directed verdict. The case proceeded beyond that point when the defendants offered evidence.

It is an anomaly in this case that the trial judge considered the defendants' evidence for the purpose of entering a directed verdict for the third party defendant T. L. Arney on 4 December 1975, but refused to consider defendants' evidence for the purpose of entering the directed verdicts for the original defendants on 5 December 1975.

We conclude that the trial judge was correct in directing a verdict in favor of the original defendants upon the issue of punitive damages. This motion was made and ruled upon at the close of plaintiff's evidence and before defendants offered evidence.

The result is this:

The directed verdicts in favor of the original defendants upon plaintiff's cause of action for punitive damages are affirmed.

The directed verdicts in favor of the original defendants upon plaintiff's cause of action for compensatory damages are reversed, and a new trial is ordered upon plaintiff's alleged cause of action against the original defendants for compensatory damages.

Affirmed in part.

New trial in part.

Judges PARKER and ARNOLD concur.

HAL D. MOSLEY AND WIFE, HILDA P. MOSLEY v. PERPETUAL SAVINGS AND LOAN ASSOCIATION

No. 7618SC54

(Filed 18 August 1976)

Contracts § 27— contract to procure survey — time for obtaining — no breach of contract

In an action for breach of contract where plaintiffs alleged that they entered into a construction loan contract with defendant which included a provision by defendant to secure a survey of plaintiffs' property to insure that the residence to be built thereon would be located within the boundaries of said property, defendant's motion for directed verdict should have been allowed, since the contract on which plaintiffs based their claim was secondary to the principal contract for the construction loan, and, while the evidence tended to show that defendant agreed to order a survey after being notified that the footings of the house had been poured, there was no evidence tending to show that defendant agreed to procure a survey immediately after being so notified.

APPEAL by defendant from *Albright, Judge.* Judgment entered 21 August 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 6 May 1976.

This action is based on alleged breach of contract. In their complaint, plaintiffs allege in pertinent part:

On 23 March 1973 plaintiffs and defendant entered into a construction loan contract which included a provision by defendant to secure a survey of plaintiffs' property to insure that the residence to be built thereon would be located within the boundaries of said property. Plaintiffs advanced defendant $35 to pay for the survey and were to notify defendant when the footings of the residence had been poured after which defendant would procure the survey. Although plaintiffs notified defendant when the footings were poured, defendant failed to provide a survey at that time.

A survey made after the house was well under construction disclosed that it was partially built on the property of another landowner. Defendant breached the contract by failing to secure a survey at the time the footings and foundation were completed; cost of correcting the error at that time would have been minimal. As a result of defendant's breach of contract, plaintiffs have sustained damages amounting to $9,899.75 representing cost of relocating their garage, diminished value of the

house and additional rent and interest paid due to delay in completing the house.

In its answer defendant denied material allegations of the complaint and alleged that the error in locating the house on the lot was due to the negligence of plaintiffs and the builder of their house.

Plaintiffs and defendant presented evidence, pertinent parts of which are hereinafter summarized.

Issues were submitted to and answered by the jury as follows:

"1. Did Defendant breach the contract between the parties as alleged in the Complaint?

ANSWER: Yes.

"2. If so, what amount of damages are Plaintiffs entitled to recover of Defendant?

ANSWER: 9,899.75."

From judgment entered on the verdict, defendant appealed.

Morgan, Byerly, Post, Herring & Keziah, by Steven E. Byerly and J. V. Morgan, for plaintiff appellees.

Sprinkle, Coffield & Stackhouse, by H. Irwin Coffield, Jr., for defendant appellant.

BRITT, Judge.

Defendant assigns as error the failure of the court to grant its motion for directed verdict pursuant to G.S. 1A-1, Rule 50, interposed at the close of the evidence.

Plaintiffs' claim is based on their contention that they and defendant entered into a contract whereby defendant agreed that *immediately* following notification that the footings for the house had been poured defendant would procure a survey of the property to make certain that the house was located within the boundary lines of plaintiffs' lot; that although defendant was notified immediately after the footings were poured it delayed procuring a survey until considerable work had been done on the house; and that as a result of the delay plaintiffs sustained the damages sought.

"To constitute a valid contract, the parties must assent to the same thing in the same sense; this assent is commonly known as a meeting of the minds." 2 Strong, N. C. Index 2d, Contracts § 2, p. 293. "But where the agreement is so vague and uncertain that no *definite* agreement can be ascertained, there is no valid contract." (Emphasis added.) *Ibid.* § 3, p. 296.

Plaintiffs' evidence consisted of testimony by the male plaintiff and the builder, Lee Mauldin, and certain exhibits. The male plaintiff's testimony relative to the alleged contract and its breach is summarized in pertinent part as follows:

On or about 23 March 1973 defendant approved plaintiffs' application for a loan of $28,650 to provide funds to construct a house on lots previously purchased by them. On said date the male plaintiff signed a loan statement prepared by defendant which listed various charges including a survey fee of $35, the total charges amounting to $1,522. At the same time he and Mauldin signed a construction loan agreement with defendant which contained a provision that they would "construct said building(s) wholly within the boundary lines of the land offered as security, and located as shown on a survey approved by [defendant]." Said agreement also contained the following: "Additional provisions and conditions: *Notify savings and loan* as soon as footings are poured so that a final survey may be ordered. No funds will be disbursed until we have a final survey in our files."

Thereafter Mauldin began work on the house and at Mauldin's request male plaintiff notified defendant's Mr. Frye when the footings were poured. At that time Frye told him he did not understand the notification because the builder could not draw on the loan proceeds until the house was "dried in." Around 27 June 1973 he was advised by a representative of defendant that a plat of survey bearing that date disclosed that two feet of the garage extended onto the lot of an adjoining owner. On that date the house had been dried in—framed, roof on, windows and sheetrock hung, etc. After considering several alternatives, including an effort to purchase part of the adjoining lot, plaintiffs agreed with the builder to tear down the garage and rebuild it completely on their lot.

On cross-examination the male plaintiff stated: Before starting construction of the house a representative of defendant told him that he did not have to do anything about the survey.

Prior to and after purchasing the lot no one ever showed him the corners of his property. When the builder laid out the house " . . . he told the builder the general vicinity of where the lot was; that there were no stakes there and that he told Mr. Mauldin what he felt was the land and to put the house in the center of it. . . . " He relied on Conrad (the realtor who sold the lot) "as to where his land was" and defendant did not make any representation regarding what was his land.

Mauldin's testimony on cross-examination included the following:

> "At the time he built this home he did not own a surveyor's transit but simply a surveyor's level. He staked the house off as close as he could to where Mr. Mosley told him to put the house on the lot, that he did not walk around the outer perimeter of the lot with Mr. Mosley; that he made no effort to locate the stakes and in the past he had always relied on the Perpetual Savings and Loan Association to secure survey, that the Perpetual Savings and Loan Association required a survey for their own protection since they did not want a house which was not on the lot."

The disbursement schedule of the construction loan agreement (plaintiffs' exhibit 3) provided that the initial disbursement would be made following rough grading of the lot and when footings and foundation, subflooring and framing, sheeting, roof and chimney were completed.

Defendant's evidence with respect to a survey of plaintiffs' property is summarized in pertinent part as follows:

When plaintiffs applied to defendant for a loan, its loan officer advised plaintiffs that a plat of survey showing that the house was located on the lot would be required before any loan funds were disbursed; that defendant should be notified as soon as the footings were poured so that defendant might *order* a survey. Mr. Frye did not recall the male plaintiff informing him that the footings had been poured.

Defendant requires a plat of survey of all real estate on which it makes loans in order to make certain that the improvements are on the land. This requirement also benefits the borrower who may provide the survey but if he does not, then defendant will obtain it.

Around 17 June 1973 Mauldin informed defendant that the house had been closed in and that he wanted to draw some funds. Defendant inspected the house on 18 June 1973 and determined that it was approximately 19 percent completed. Finding that it did not have a plat of survey, defendant immediately ordered a survey which was made within a few days thereafter. On or about 27 June 1973 defendant was furnished a plat showing the encroachment. Immediately thereafter defendant notified plaintiffs of the problem and efforts were begun to solve it.

Although we have considered plaintiffs' evidence in the light most favorable to them, and only that part of defendant's evidence which does not contradict but only supports, clarifies or explains plaintiffs' evidence, we conclude that defendant's motion for directed verdict should have been allowed.

Without question the principal contract between the parties related to the loan from defendant to plaintiffs. The alleged contract on which plaintiffs base their claim was secondary to the principal contract. While the evidence tended to show that defendant agreed to order a survey after being notified that the footings had been poured, we find no evidence tending to show that defendant agreed to procure a survey *immediately* after being so notified.

For the reasons stated, the judgment appealed from is

Reversed.

Judges PARKER and MARTIN concur.

CARL ROSE & SONS READY MIX CONCRETE, INC. v. THORP SALES CORPORATION

No. 7623SC46

(Filed 18 August 1976)

Process §§ 1, 5; Rules of Civil Procedure § 4— action against corporation — summons directed to individual — jurisdiction — amendment of summons

Where the summons in an action against Thorp Sales Corporation was directed to a named individual as agent for "Executive Square— Thorp Commercial Corporation," the court acquired no jurisdiction over defendant Thorp Sales Corporation, default judgment entered against

such defendant is void, and the court was not authorized by G.S. 1A-1, Rule 4(i) to permit plaintiff to amend the summons. G.S. 1A-1, Rule 4(b).

APPEAL by defendant from *McConnell, Judge.* Order entered 10 November 1975 in Superior Court, YADKIN County. Heard in the Court of Appeals 5 May 1976.

Plaintiff instituted this action on 27 December 1973 to recover damages for breach of contract from defendant Thorp Sales Corporation. When the complaint was filed, a summons was issued on which the following appears:

"STATE OF NORTH CAROLINA
COUNTY OF YADKIN

In the General Court of Justice, Superior Court Division

Carl Rose & Sons Ready Mix Concrete, Inc.
Against
Thorp Sales Corporation

STATE OF NORTH CAROLINA

To each of the defendants named below—GREETING:

Defendant	Address
Brion McDermott agent for Thorp Commercial Corporation	Executive Square—Greensboro, N. C.

YOU ARE HEREBY SUMMONED AND NOTIFIED to appear and answer to the above entitled civil action as follows: a written Answer to the Complaint must be served upon the plaintiff or his attorney within THIRTY DAYS after the service of this Summons and a copy thereof must be filed at the office of the undersigned clerk. If you fail to do so, the plaintiff will apply to the court for the relief demanded in the Complaint."

On the section of the summons provided for "Return of Service" it is recited that a summons and complaint were served "on Thorp Commercial Corporation on the 10th day of January, 1974, at the following place: 2722 Church Street, 2:57 p.m. By: X leaving copies with Brion McDermott, Agent."

On 27 March 1974 an entry of default was entered against the defendant, Thorp Sales Corporation. Judgment by default

was entered on 15 November 1974. Thereafter execution was issued on the judgment, and as a result thereof the defendant Thorp Sales Corporation was forced to pay to the Sheriff of Gaston County the sum of $6,227.37.

Defendant Thorp Sales Corporation filed a motion on 11 September 1975, pursuant to Rules 12 and 60 of the North Carolina Rules of Civil Procedure, asking the court to set aside the Entry of Default and judgment and to dismiss the action on grounds of lack of jurisdiction over the defendant, insufficiency of process, and insufficiency of service of process. Defendant also moved for return of the money collected from it pursuant to the Judgment. On 26 September 1975 plaintiff, pursuant to Rule 4(i) of the Rules of Civil Procedure, moved to amend the summons by striking "Brion McDermott, agent for Thorp Commercial Corporation" under defendant, and substituting in lieu thereof the name "Thorp Sales Corporation, Brion McDermott, Agent." Following a hearing, the Court entered its order on 10 November 1975 denying defendant's motion to set aside the judgment and allowing plaintiff's motion to amend the summons. Defendant appealed.

Finger & Parker by Raymond A. Parker II and Daniel J. Park for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice by William C. Raper for defendant appellant.

PARKER, Judge.

"For a court to give a valid judgment against a defendant, it is essential that jurisdiction of the party has been obtained by the court in some way allowed by law. When a court has no authority to act, its acts are void." *Russell v. Manufacturing Co.*, 266 N.C. 531, 534, 146 S.E. 2d 459, 461 (1966). The contents required in a summons are set out in G.S. 1A-1, Rule 4(b), and one of the essential requirements is that the summons "shall be directed to the defendant or defendants and shall notify each defendant to appear and answer." The summons issued in the present case fails to comply with this requirement. It is not directed to the defendant, Thorp Sales Corporation, and does not notify defendant to appear and answer. The court acquired no jurisdiction over defendant and the default judgment entered against defendant is void. *Philpott v. Kerns*, 285 N.C. 225, 203 S.E. 2d 778 (1974); *Distributors v. McAndrews*, 270

N.C. 91, 153 S.E. 2d 770 (1967); *Russell v. Manufacturing Co.*, 266 N.C. 531, 146 S.E. 2d 459 (1967).

The broad discretionary power given the court by G.S. 1A-1 Rule 4(i) to "allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued," does not extend so far as to permit the court by amendment of its process to acquire jurisdiction over the person of a defendant where no jurisdiction has yet been acquired. *See Distributors v. McAndrews, supra.* A defendant "cannot, in this short-hand manner by amendment, be brought into court without service of process." *Plemmons v. Improvement Co.*, 108 N.C. 614, 615, 13 S.E. 188 (1891).

The order appealed from is

Reversed.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. HAZEL FRANKLIN JORDAN

No. 7621SC214

(Filed 18 August 1976)

1. **Criminal Law § 120— jury verdict — recommendation of mercy — jury instruction inappropriate**

The general rule in N. C. is that it is error for the court to instruct the jury either in the general charge or in response to an inquiry made by the jury that they may return a verdict with recommendation of mercy, or with other words having reference, necessarily, to the judgment to be rendered by the court.

2. **Criminal Law § 120— jury verdict — recommendation of mercy or psychiatric treatment — instruction not prejudicial**

Defendant was not prejudiced where the jury informed the court that it had reached its verdict, the jury foreman then asked the court if the jury might recommend mercy or psychiatric treatment, and the court responded, before he took the verdict, that he would consider any recommendation that the jury made, after the verdict was received, though it would have been more appropriate for the judge to have explained to the jury before taking the verdict that the matter of judgment was not part of their responsibility and was entirely the province of the trial court.

State v. Jordan

APPEAL by defendant from *Long, Judge.* Judgment entered 26 November 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 10 June 1976.

The defendant, Hazel Franklin Jordan, was charged in separate bills of indictment for assault on Nancy Jordan with the use of a deadly weapon with intent to kill, inflicting serious injury; for discharging a firearm into an occupied dwelling; and for felonious entry with intent to commit a felony. He pleaded not guilty and the State offered evidence tending to show the following:

Defendant was separated from his wife on the night of 17 August 1975 when he went to her trailer and cut the electrical and telephone wires. Michael Potter, who was visiting defendant's wife, Nancy Jordan, opened the door to investigate and the defendant shot at him. The bullet missed, going into the ceiling of the trailer. Before Potter could lock the door, the defendant came into the trailer, chased his wife out the back door into the woods and shot her in the chest. Potter ran next door to Noah Jones's trailer and had Jones call the Sheriff. When defendant's wife beat on the door to be let in, defendant pushed through the door behind her, looking for Potter, saying he was going to kill him. Jones got the defendant's gun away from him and defendant ran. The defendant did not appear drunk or smell of alcohol at the time. He had threatened his wife several times prior to the night of 17 August.

The defendant testified and offered evidence to show that he was drunk at the time and did not remember anything about the night of the alleged offenses. He was also under a psychiatrist's care at the time and had been taking "nerve pills"—two of them on 17 August. He offered into evidence portions of taped conversations with his wife subsequent to 17 August in which she stated to him that he had not broken into Jones's trailer; that he was drunk on the night of 17 August; that he was not responsible for his actions that night; and that she did not want to testify but that "they browbeat her" so she would testify.

The jury returned verdicts of guilty as charged in all three indictments. From judgment imposed that he be imprisoned sixteen to twenty years on the felonious assault charge, eight to ten years on the charge of discharging a firearm into an occupied dwelling, and eight to ten years on the felonious

entry charge, the sentence in the assault charge to run concurrently with the other two sentences, which were to run consecutively, defendant appealed.

Attorney General Edmisten by Assistant Attorney William F. Briley for the State.

Wilson and Morrow by John F. Morrow for defendant appellant.

HEDRICK, Judge.

The following appears in the record and is the basis of defendant's ninth assignment of error.

> "DEPUTY SHERIFF ROLLINSON: The foreman of the jury would like to speak to you.
>
> THE COURT: You will have to bring all the other members of the jury in, if he wishes to speak to the court.
>
> (The jury returned to the courtroom.)
>
> FOREMAN REPETTO: Your Honor, may I speak to you a second?
>
> THE COURT: Just one moment. It will have to be in open court and on the record. All right, do you have a question?
>
> FOREMAN REPETTO: We have reached our verdict, so the question will not affect our verdict. But our question is, can we, the jury recommend any mercy? And at once—that is, two questions: Can we recommend mercy and then two, can we recommend any psychiatric treatment, or is that purely your decision?
>
> THE COURT: Well, the matter of judgment is entirely a matter for the court, not for the jury. However, I will consider any recommendations that you may make, but I would prefer that we take the verdict before receiving those recommendations."

Based on the foregoing, the defendant contends "the trial court committed prejudicial error in telling the jury that he *would* consider any recommendations that they made." We find this assignment of error to be without merit.

[1] The general rule in North Carolina is that it is error for the court to instruct the jury "either in the general charge or in response to an inquiry made by the jury, that they may return a verdict with recommendation of mercy, or with other words having reference, necessarily, to the judgment to be rendered by the court." 3 Strong, N. C. Index 2d, Criminal Law, § 120, p. 32, citing *State v. Rowell,* 224 N.C. 768, 32 S.E. 2d 356 (1944).

[2] The record discloses that before the verdict was taken the jury made it quite clear to the court that it had reached its verdict before it was permitted to ask the court if it could recommend mercy or psychiatric treatment. Furthermore, after the verdict was taken and the defendant's counsel declined to have the jury polled, the foreman stated to the court that "we went to extremes to get the verdict first, before we discussed the question of mercy or psychiatric treatment." While it would have been more appropriate for the judge to have explained to the jury before taking the verdict that the matter of judgment was not part of their responsibility and was entirely the province of the trial court, *State v. Davis,* 238 N.C. 252, 77 S.E. 2d 630 (1953), we do not perceive, under the circumstances of this record, any possible prejudice to the defendant in the court's telling the jury, before he took the verdict, that he would consider any recommendation that it made, after the verdict was received.

The defendant has numerous other assignments of error which we have carefully examined and find to be without merit. The defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and MARTIN concur.

FRED J. STANBACK, JR., EXECUTOR OF THE ESTATE OF FRED J. STANBACK v. J. HOWARD COBLE, SECRETARY OF REVENUE OF NORTH CAROLINA

No. 7619SC119

(Filed 18 August 1976)

Taxation § 27— inheritance taxes — U. S. Treasury bonds — valuation

The Secretary of Revenue is required by G.S. 105-29(a) to value assets of an estate for inheritance tax purposes at the same amount as they have been valued for federal estate tax purposes; therefore, there was no taxable gain to an estate for income tax purposes on the difference between the alternate value placed on U.S. Treasury bonds for State inheritance tax purposes and the par value of the bonds as accepted in satisfaction of federal estate taxes since the bonds should be reassessed for inheritance tax purposes at the same value as they were accepted in satisfaction of the federal estate taxes.

Judge VAUGHN concurs in the result.

APPEAL by defendant from *Kivett, Judge*. Judgment entered 18 November 1975, Superior Court, ROWAN County. Heard in the Court of Appeals 13 May 1976.

This is a civil action brought pursuant to G.S. 105-266.1 for the refund of income tax paid by the plaintiff to the defendant for the taxable year 1972. The estate of Fred J. Stanback, Sr., had acquired United States Treasury bonds having a total par value in excess of $570,000. Decedent's executor, the plaintiff, used these bonds as a credit for $570,000 of federal estate tax during the taxable year 1972. Under the alternate valuation date of 3 November 1973 chosen by the executor for inheritance tax purposes the bonds had a fair market value of $454,746.

The North Carolina Income Tax Diviison made an assessment against the plaintiff based on a gain in income resulting from the disposition of the bonds. Since North Carolina viewed the basis of the bonds as $454,746 and the bonds had been used to satisfy federal estate taxes of $570,000, the Department of Revenue made an assessment against the plaintiff for additional income tax of $8,471.17 on the taxable gain of $115,254. Plaintiff paid the tax on 7 November 1974 and requested a refund which was denied.

The court entered judgment for the plaintiff, concluding as a matter of law that the bonds should be valued at par for North Carolina inheritance tax purposes and therefore the difference in the par value and the fair market value of such bonds was not income to the estate of Fred J. Stanback, Sr. and plaintiff is entitled to a refund. Defendant appealed.

Kluttz and Hamlin, by William C. Kluttz, Jr., for plaintiff.

Attorney General Edmisten, by Associate Attorney William H. Boone, for the State.

MARTIN, Judge.

Defendant contends that G.S. 105-29(a) does not require North Carolina to strictly conform with federal estate tax valuations in view of the sentence in that statute stating: "In either event the Secretary of Revenue shall proceed to determine, from such evidence as may be brought to his attention or which he shall otherwise acquire, the correct value of the said estate . . . . " Defendant contends the two situations referred to in the sentence are a higher assessment of the estate's value by the federal government than the value reported for North Carolina interitance tax purposes *or* a lower assessment by the federal government than that reported for inheritance tax purposes. In either event, defendant contends he has flexibility in determining the estate's value for inheritance tax purpurposes. Defendant further contends that G.S. 105-144(a) provides that the basis of the bonds is their fair market value at the date of death or the alternate valuation date and that the estate therefore acquired a gain in income through the "disposition" of the bonds at an amount in excess of their basis and such gain was properly treated as income to the estate of Fred J. Stanback, Sr. We disagree.

G.S. 105-29(a), which provides that "If the amount of said estate as assessed and fixed by the federal government shall be in excess of that theretofore fixed or assessed under this schedule for the purpose of determining the amount of taxes due the state from said estate, then the Secretary of Revenue shall reassess said estate and fix the value thereof at the amount fixed, assessed, and determined by the federal government . . . " , *requires* the Secretary of Revenue to value assets of an estate at the same amount as for federal estate tax purposes, and the sentence of that statute cited by defendant does not qualify

this requirement but refers instead to the "events" of an executor contesting the Secretary of Revenue's increasing the estate value or petitioning the Secretary to reduce the estate value.

There is divergence in the views of courts in other jurisdictions dealing with the question whether United States Treasury bonds are to be valued for state inheritance or estate tax purposes at par or face value or at the lower market price. For this reason no useful purpose would be made to discuss the several cases cited by the parties sustaining their positions.

We think the meaning of G.S. 105-29 is clear. However, if the meaning is doubtful, it should be construed against the State and in favor of the taxpayer unless a contrary legislative intent appears. See *In Food House, Inc. v. Coble, Sec. of Revenue*, 289 N.C. 123, 221 S.E. 2d 297 (1976).

Affirmed.

Judge CLARK concurs.

Judge VAUGHN concurs in the result.

INLAND BRIDGE COMPANY, INC. AND ROADBUILDERS, INC. (A JOINT VENTURE) v. NORTH CAROLINA STATE HIGHWAY COMMISSION (NOW BOARD OF TRANSPORTATION)

No. 7610SC262

(Filed 1 September 1976)

1. Highways and Cartways § 9— road building — no misrepresentation as to soil conditions

In an action to recover damages allegedly resulting from certain misrepresentations made by defendant to plaintiffs in the letting of a contract for road grading and construction, findings of the trial court were clearly supported by the evidence and were sufficient to support the conclusion that defendant did not misrepresent the composition and moisture of the soil to be encountered in the construction of the project.

2. Highways and Cartways § 9— claim against Highway Commission — hearing by State Highway Administrator prerequisite

Plaintiffs were bound by their claim based solely on misrepresentation filed with the State Highway Administrator, and they were estopped from developing additional theories in the superior

court, since G.S. 136-29 provides that any claim against the Highway Commission must first be made to the State Highway Administrator, and the claimant must set forth facts upon which the claim is based.

3. Highways and Cartways § 9— building of road — claim for additional compensation — failure to comply with contract — no recovery

In an action to recover damages allegedly resulting from certain misrepresentations made by defendant to plaintiffs in the letting of a contract for road grading and construction, findings by the trial court that plaintiffs failed to notify defendant of changed conditions in accordance with the contract and that plaintiffs failed to keep force account records as required by the contract were supported by the evidence; therefore, the court properly concluded that plaintiffs were not entitled to recover additional compensation for extra work since they failed to comply strictly with the contract.

APPEAL by plaintiffs from *Bailey, Judge.* Judgment entered 1 December 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 17 June 1976.

This is a civil action wherein the plaintiffs, Inland Bridge Company, Inc. and Roadbuilders, Inc. (a Joint Venture), are seeking $169,820.94 damages from the defendant, North Carolina State Highway Commission (now Board of Transportation), allegedly resulting from certain misrepresentations made by defendant to plaintiffs in the letting of a contract for road grading and construction.

In their complaint plaintiffs alleged in part that they entered into a contract with defendant on 29 August 1967 for the "relocation of U.S. 21 in Charlotte from the south city limits northerly to a point approximately 0.4 miles south of Shuman Road." Part of the project consisted of the building of certain embankments for a roadway which required excavation, filling, hauling, drying and compacting the material to specifications. Contained in the contract was the following:

> "Note to contractor: the contractor's attention is directed to the fact that the natural moisture of the material to be placed in the embankment is approximately 40%. This material shall be dried to optimum moisture as determined by the engineer."

In bidding on the project, plaintiff relied upon and were entitled to rely upon the representation that the moisture content of the fill dirt was 40%. In fact the natural moisture was not approximately 40% but in many instances greatly exceeded

40%. The defendant had actual knowledge that the soil to be used in the embankments "could not be practically moved and dried." Notwithstanding this knowledge, defendant classified the soil as "Unclassified" rather than "Unsuitable," "without alluding to the facts known to it as to the condition of the material and as to the impracticability of processing it as called for by the contract."

> "That as a result of the incorrect classification of the dirt, soil and material in the contract proposal and representation by the defendant and as a result of the defendant's failure to make known to plaintiffs the true condition of said material and defendant's concealment of vital and relevant information in regard thereto from the plaintiffs * * * the plaintiffs incurred excess costs on said project in the amount of $169,820.94."

The defendant answered denying that there was any material misrepresentation of the conditions of the fill dirt. In addition, in a memorandum supporting defendant's motions for dismissal and summary judgment, defendant alleged that there were procedures to follow, as set out by the contract, when the contractor encountered conditions different from those indicated in the contract and that plaintiffs had failed to follow those procedures. Plaintiffs also filed a motion for summary judgment with supporting affidavits. Plaintiffs' motion and defendant's motions were denied.

At trial without a jury, the proposal, the contract, and the Standard Specifications for Roads and Structures (SSRS), incorporated by reference into the contract, were introduced into evidence. Included in the SSRS are the following pertinent provisions:

> "4.3A Should the Contractor encounter or the Commission discover during the progress of the work conditions at the site differing materially from those indicated in the contract, which conditions could not have been discovered by reasonable examination of the site, the Engineer shall be promptly notified in writing of such conditions before they are disturbed. The Engineer will thereupon promptly investigate the conditions and if he finds they do so materially differ and cause a material increase or decrease in the cost of perform-

ance of the contract, an equitable adjustment will be made and a supplemental agreement entered into accordingly."

4.4(B) Request for Authorized Modification:

Whenever, the Contractor is required to perform work which is, in his opinion, extra work, and an authorized modification therefor has not been issued by the Engineer, then the Contractor may make written request for an authorized modification at any time before beginning any of the alleged extra work.

Where the Engineer agrees that there is such extra work to be performed then he will issue an authorized modification providing for the performance of the extra work in conjunction with a supplemental agreement if prices have been agreed upon, or with a force account notice if agreement on prices has not been reached, to provide payment for the extra work. The Contractor will not be authorized to begin any extra work until he has received the authorized modification pertaining to such extra work.

Where the Engineer does not agree that there is such extra work to be performed, then he will issue a written denial of the Contractor's request for an authorized modification."

"4.4(C) If the Contractor's request for an authorized modification has been denied by the Engineer and the Contractor intends to file a claim for payment for performing such alleged extra work, he shall notify the Engineer in writing of his intention to file a claim for such payment and shall receive written acknowledgment from the Engineer that such notification has been received before he begins any of the alleged extra work. In such case the Contractor will be required to keep an accurate and detailed cost record which will indicate the cost of performing the extra work. Such cost records will be kept with the same particularity as force account records and the Commission shall be given the same opportunity to supervise and check the keeping of such records as is done in force account work."

"22-3.8 The classification of all roadway and drainage excavation shall be made by the Engineer as the work progresses and the classification as determined by the Engineer for the work completed each month will be included in the current monthly estimate. If classification thus allowed is protested by the contractor, the claim must be made in writing by him within 30 days after the current estimate is mailed to him."

"22-1.1 Description [Roadway and Drainage Excavation]. This item shall consist of the removal and satisfactory disposal of all . . . unsuitable subgrade material and the replacement of such unsuitable material with satisfactory material . . . "

"22-1.2 The classification of all materials excavated shall be as follows:

* * *

(b) Unclassified Excavation shall include all excavation within the limits of the original slope stakes. * * *

Unsuitable material shall be classified as any material which is unsatisfactory for use under a base course or pavement. It shall not include any rock undercut in the roadbed."

Included in the proposal were the following pertinent provisions:

"UNCLASSIFIED EXCAVATION:

This item shall include the removal of all existing flexible type pavement, walls, steps and other masonry items inside or outside the limits of the right of way which in the opinion of the Engineer is rendered useless for highway purposes by the construction of this project. These items that are removed shall be used in embankments or disposed of in waste areas furnished by the Contractor.

These items that are removed will be measured and paid for at the contract unit price per cubic yard, 'Unclassified Excavation'. The cost of disposal shall be included in the unit price bid per cubic yard 'Unclassified Excavation'."

"AVAILABILITY OF SUBSURFACE INFORMATION:

The Commission will make available, only upon specific request by a prospective bidder, subsurface information pertaining to this project. Such information will be made available, without warranty implied or expressed as to accuracy, only where a request is submitted to the Commission on a form letter inserted elsewhere in the proposal for this purpose, and in accordance with the conditions set out in such form letter."

"UNSUITABLE MATERIAL EXCAVATION:

The Contractor will be required to remove unsuitable material at locations as shown in the plans and other locations as the Engineer may direct. The unsuitable material shall be removed to a depth of 3 feet below the top of the subgrade or to widths and depths as directed by the Engineer."

"NOTE TO CONTRACTOR:

The Contractor's attention is directed to the fact that the natural moisture of the material to be placed in embankments is approximately 40%. This material shall be dried to optimum moisture as determined by the Engineer."

Plaintiffs bid $342,650.00 for excavation of unclassified material which was computed at $.77 per cubic foot of excavation. They bid $36,250.00 for excavation of unsuitable material which was computed at $2.50 per cubic yard. Prior to bidding, they requested the "subsurface information" from the defendant, which was introduced at trial. On each page of the information which defendant supplied, there was stamped the following:

"Note: The information contained herein is not implied or guaranteed by the N. C. State Highway Commission as being accurate, nor is it considered to be a part of the plans, specifications, or contract for the project.

By having requested this information the contractor specifically waives any claim for increased compensation or extension of time based on differences between the conditions indicated herein and the actual conditions at the project site."

Included in the information was data showing natural soil moisture test results from ten tests. The results ranged from 29.4% to 43.3% natural moisture.

At trial Marion Lowe, Job Superintendent for plaintiffs, Mr. Fred Triplett, President of Inland Bridge Company, and Dr. W. Kenneth Humphries, Professor of Engineering at the University of South Carolina with a doctorate in soils mechanics. testified for plaintiffs. Together their testimony in part showed the following:

Plaintiffs began work at the site in August 1967. Almost immediately after beginning work, it became apparent that it was going to be difficult to dry the soil to optimum moisture or to compact it to the 95% density as required by the engineer. On 20 November 1967, they met with representatives of defendant and discussed with them the problems that had arisen. Defendant offered certain suggestions and began on site soil moisture testing. On 26 March 1968, plaintiffs met with defendant's representatives again to discuss the problem of drying the soil. At that meeting, Triplett stated that it was "not feasible to try to dry this material," and that he was employing every possible means to dry the material but that it would not be possible to dry the material "within practical methods" before the time set for completion of the project. Mr. Roberts, for the defendant, agreed to come out to see if everything possible was being done.

In April, 1968, Triplett performed his own "natural moisture" analysis and obtained results on his 16 tests showing moisture content as high as 66.6%. Almost none of the test results were below 40%.

It was the opinion of Lowe that over half the "unclassified material" was in fact "unsuitable material."

Humphries explained that the soil in the area of the project was difficult to work with. The nature of the soil caused it to retain moisure more than normal soil and when compacted it had a tendency to increase the capillary action of the soil in drawing water up from the levels below. In his opinion the soil was unsuitable for use on the project. It was his opinion that there was nothing in the contract to put the plaintiffs on notice that the soil would be unsuitable. He also testified, however, that as a soils expert he would have concluded on the basis of the subsurface information and the project plans alone that the material was unsuitable.

On 6 May 1968, Triplett wrote the following letter to J. F. Warren, Resident Engineer:

"Mr. J. F. Warren
Resident Engineer
State Highway Commission
P. O. Box 12153
Charlotte, North Carolina 28205

Re: Construction Conference of March 26, 1968
N. C. Project 8.1654707-etc.—Mecklenburg County

Dear Sir:

Subsequent to the above conference, we have redoubled our efforts toward drying this soil. We have, as your records will hear out, exhausted every practical resource and are yet not even close to drying this unusual material anywhere near rapidly enough to allow us to prosecute this job to a practical conclusion. We would like to reiterate that this material has been shown to successfully resist even extreme practical methods to dry it out to optimum moisture; therefore, we will, under present circumstances, be forced to present a claim in this connection in the future based on an engineering impracticability.

In the interest of a workable solution we have investigated the use of hydrated lime to dry and possibly improve the soil. The use of this material in an appropriate quantity and manner throughout the work could give us a workable situation. If after your investigation, this special treatment is indicated, we offer to place this material in the fill according to standard practices listed for lime modification of subgrade material in the Lime Stabilization Construction Manual at a price of $30.00 per ton in place. In this way, you will be in complete control of the amount of application as well as the scope of the entire operation.

Please advise us as soon as possible if you are in favor of a trial of this method on this basis.

Awaiting your valuable reply we are—

Yours truly,
INLAND BRIDGE CO., INC.
& ROADBUILDERS, INC.
s/ Fred Triplett

cc. Roadbuilders—Greenville & Bosperity"

There was a construction conference on 8 May 1968 and on 14 May 1968. Warren replied to the defendant that the State was investigating the use of lime.

On 27 May 1968, Triplett wrote the following letter to John Davis, Assistant Chief Engineer, Construction & Maintenance in Raleigh:

"Mr. John Davis
Assistant Chief Engineer Construction & Maintenance
North Carolina Highway Commission
Raleigh, North Carolina

Re: N.C. Project 8.1654707—etc.
Mecklenburg County

Dear Sir.

We doubled and redoubled our efforts to dry this soil on something akin to a production basis to no apparent avail. In fact, we have not been able to dry one spot anywhere to optimum moisture. We believe that the inherent moisture of this soil (up to 50%) coupled with its extreme capillarity and affinity for water makes it impractical from an engineering standpoint to dry to anywhere near optimum moisture or compact to 95% density. *We respectfully request, therefore; that this material be classified as unsuitable material and we be allowed to waste it.*

If this remedy does not seem entirely practical to you, we are, of course, amenable to any alternatives you may suggest which will, in fact, afford us to complete this work satisfactorily to us both.

Please advise when we may meet with you in order to persue (sic) this matter toward a sensible conclusion.

Yours truly,
Fred A. Triplett, Jr.

T/c
cc: Mr. J. M. Warren
Mr. Arthur L. Gaston
Mr. Vernon Epting"

On 6 June 1968, the results of tests conducted by defendant indicated that it would be beneficial to use lime to stabilize

the soil. Subsequently, an "Extra Work Order" was entered between plaintiffs and defendant. In addition to agreeing as to payment for the cost of liming the soil, defendant subsequently agreed to extend the time for completion of the project and reduced the compaction requirement to 90%. The work was completed in April 1969. On 25 August 1969, Triplett wrote to T. W. Funderburk, Resident Engineer, wherein he stated that: "We plan to present a claim pertaining to the roadway excavation item as soon as we can complete proper documentation." It was stipulated prior to trial that plaintiffs proceeded according to statute in subsequently presenting the claim.

The discussion of other evidence will appear as necessary in the opinion.

At the conclusion of plaintiffs' evidence, defendant moved to dismiss. Judge Bailey granted the motion, finding and concluding that the conditions at the site were substantially as represented by defendant in the contract and that defendant did not mislead plaintiffs into submitting a low bid. Moreover, he found that plaintiffs did not comply with the contract provisions for obtaining additional compensation by reason of any alleged material change in the site conditions. From judgment entered that plaintiffs' action be dismissed, plaintiffs appealed.

Eugene L. Brantly and Jordan, Morris and Hoke by Joseph E. Wall for plaintiff appellants.

Attorney General Edmisten by Special Deputy Attorney General Eugene A. Smith and Associate Attorney Robert W. Kaylor for the State.

HEDRICK, Judge.

Plaintiffs assign as error the granting of defendant's motion for dismissal. Under Rule 41(b) in a trial without a jury, the trial judge does not consider the evidence in the light most favorable to the plaintiff. Instead, he must consider and weigh all the competent evidence before him, passing upon the credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn therefrom. The trial court must make findings and conclusions in support of his order; and where the findings are clearly supported by the evidence, they are binding on appeal. *Helms v. Rea,* 282 N.C. 610, 194 S.E. 2d 1 (1973); G.S. 1A-1, Rules 41(b) and 52(a).

[1] In the present case, plaintiffs have excepted to numerous findings and to every conclusion made by the trial court. We have examined the exceptions to the findings of fact and find them to be without merit. In particular, the court found the following:

"(19) The plaintiffs, prior to bidding on the project, requested from and received subsurface information made available by the defendant.

(20) The subsurface information furnished plaintiffs, Exhibit D-8(2), contained information relative to the composition and moisture of the soil to be encountered in the construction of the project. Defendant's Exhibit D-8(2), shows the results of ten moisture tests taken by defendant's personnel in December, 1966. The natural moisture content as indicated in each of the samples was as follows: 29.4%, 31.6%, 33.5%, 34%, 35.3%, 36.8%, 39.1%, 39.2%, 40.5%, and 43.3%.

(21) Section 2.5 of the Standard Specifications, entitled EXAMINATION OF PLANS, SPECIFICATIONS, AND SITE WORK provides as follows: 'The bidder is required to examine carefully the site of the proposed work, proposal, plans, specifications, and contract forms before submitting a proposal. It is mutually agreed that submission of bids shall be considered prima facie evidence that the bidder has made such examinations and is satisfied as to the conditions to be encountered in performing the work, and as to the requirements of the plans, specifications, supplemental specifications, special provisions, and contract.'

(22) The plaintiffs made a visual inspection of the site prior to submitting a bid; however, the plaintiffs made no borings, tests, or other examinations of the material in the cut sections of the project to determine the composition of the soil or the existing moisture content.

* * *

(26) The project began at Survey Station 396± and terminated at Station 515±. The material between Station 396 and 425 had a high moisture content which was difficult to reduce to optimum moisture. The composition of some of the material shown in the subsurface information indicated the material was marginal for use in the con-

struction of roadway embankments. Project plans provided for the excavation material to be used in embankment sections on this project 3 feet below the subgrade of the finished roadway.

(27) The defendant warned prospective bidders that the material to be taken from the cut section between Stations 396 and 415 contained a high percentage of moisture, which placed the bidders on notice of difficulty in excavating and placing the material in embankments. The information made available to plaintiffs prior to bidding concerning the soil composition was such that based solely upon that information the plaintiffs' expert witness, Professor Kenneth Humphries, was of the opinion that it was unstable, difficult to dry and compact, and its use in the embankment was an 'engineering impracticability'.

(28) Plaintiffs presented no credible evidence that the composition of the soil was misrepresented by the contract documents.

* * *

(51) Plaintiffs produced no credible evidence that the 'unclassified excavation' taken from the cut section on the project was in fact unsuitable for embankment construction of the project as called for in this contract. All material classified and paid for as 'unclassified excavation' was classified and paid for in accordance with contract provisions.

* * *

(53) The material to be taken from the cut section on the project, and classified as unclassified excavation, was acceptable for embankment construction.

* * *

(56) The Court finds that the conditions at the site encountered by the contractor were substantially the same as represented by defendant in the contract documents and that the defendant did not mislead or deceive the contractor into submitting a low bid by reason of any difference between the conditions represented by defendant and those actually encountered by the plaintiffs on the project."

Each of these findings is clearly supported by the evidence. Together they support the conclusion that defendant did not

misrepresent the condition of the unclassified material which was used at the project site.

Plaintiffs have excepted to the following conclusions made by Judge Bailey:

> "(1) The plaintiff is not entitled to any additional compensation by reason of the reclassification of the soil due to the failure of the plaintiff to file a claim with the State Highway Administrator before filing suit in the Superior Court as required by G.S. 136-29.
>
> (2) The contractor, having filed a claim with the State Highway Administrator alleging 'misrepresentation of the moisture content of the soil', and the court having found as a fact that there was no material misrepresentation and that as the terms and provisions of the contract do not provide additional compensation to the contractor for increased cost by reason of misrepresentation, the plaintiffs' claim based on 'misrepresentation of the moisture content of the soil', is hereby dismissed."

[2] Plaintiffs contend strenuously that they were not bound by the claim filed with the State Highway Administrator since G.S. 136-29 clearly provides for a *de novo* trial in the superior court. They argue that they are not estopped from developing additional theories of recovery in the superior court. This contention is without merit. In *Teer Co. v. Highway Commission,* 265 N.C. 1, 143 S.E. 2d 247 (1965), the Supreme Court made it clear that the Commission is not subject to suit except in the manner provided by statute. Plaintiffs' whole claim before the Commission was for misrepresentation. Had they desired to sue under the provisions in the SSRS incorporated into the contract, which provides for claims based on changed conditions, extra work, or reclassification of materials, it was necessary for them to elect to do so prior to the trial in the Superior Court. *Construction Co. v. Highway Comm.,* 28 N.C. App. 593, 222 S.E. 2d 452 (1976).

[3] Moreover, G.S. 136-29 has been interpreted to provide for recovery only within the terms and framework of the contract. *Teer Co. v. Highway Commission,* 4 N.C. App. 126, 166 S.E. 2d 705 (1969). The evidence introduced at trial shows clearly that plaintiffs did not make any formal protest to defendant until they wrote defendants on 6 May 1968. Subsequent to the mail-

ing of that letter, plaintiffs and defendant entered into negotiations and executed an extra work order which was agreeable to both sides. Prior to 6 May 1968, plaintiffs did not formally protest in the manner provided for in the contract provisions. SSRS § 4.3A requires notice in writing to the Engineer where the contractor believes he has encountered changed conditions. SSRS 4.4(B) requires a written request for a modification in the contract and the issuance of an extra work order. SSRS § 22-3.8 provides that a protest of the classification made by the engineer must be made in writing.

Even assuming that plaintiffs could develop alternative theories of recovery at the trial level, the evidence shows clearly that they failed to proceed in the manner provided by the contract.

Judge Bailey made detailed findings with respect to the failure of the plaintiffs to notify defendant in accordance with the contract and to the failure of plaintiffs to keep force account records as required by the contract. These findings are amply supported by plaintiffs' own evidence. Indeed there is no exception to the court's finding "that the contractor did not keep cost records as required by Section 4.3A of the Standard Specifications and 9.4 of the Standard Specifications on force account work."

"Strict compliance with the contract provisions . . . is a vital prerequisite for the recovery of additional compensation based on altered work, changed conditions, or extra work." *Construction Co. v. Highway Comm.*, 28 N.C. App. at 606-607, 222 S.E. 2d at 461. The findings support the conclusion that:

> "[T]he plaintiffs are not entitled to recover any additional compensation for extra work by reason of the failure of plaintiffs to comply with the terms and provisions of the contract for obtaining addtiional compensation as a result of any alleged extra work."

The order appealed from is

Affirmed.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA FIRE INSURANCE RATING BUREAU

No. 7610INS120

(Filed 1 September 1976)

1. **Insurance § 116— fire insurance rate filing — notice of public hearing — stay of deemer provision**

The Commissioner of Insurance is not required to give notice, conduct a hearing and make his ruling on a fire insurance rate filing within 60 days from the date of the filing in order to avoid the "deemer provision" of G.S. 58-131.1; if the Commissioner, within 60 days of the filing, gives notice of a public hearing on the filing, the "deemer provision" is stayed pending the hearing and his ruling.

2. **Insurance § 116— homeowners insurance rates — denial of increase — order contrary to law and evidence — increase in effect pending further order**

Order of the Commissioner of Insurance denying an increase in homeowners insurance rates was contrary to law and the evidence, was unreasonable and arbitrary, and must be vacated; and although the Fire Insurance Rating Bureau had no authority to effect a 16.2% rate increase under the "deemer provision" of G.S. 58-131.1, the Court of Appeals in the exercise of its inherent power has allowed such increase to remain in effect until the Commissioner of Insurance performs his statutory duty in further proceedings and fixes premium rates for homeowners insurance which will produce a fair and reasonable profit and no more where the Rating Bureau presented a prima facie case supporting its filing and offered competent evidence that the previous rates were unfair and confiscatory, and where the record on appeal discloses persistent procrastination, unfairness, and partisan procedures and decisions on the part of the Commissioner.

Judge VAUGHN concurring in part.

Judge MARTIN concurs in the result.

APPEAL by defendant from Order of North Carolina Commissioner of Insurance entered 6 November 1975. Heard in the Court of Appeals 13 May 1976.

This rate-making proceeding began with the filing on 27 June 1975 by the North Carolina Fire Insurance Rating Bureau with the Commissioner of Insurance for a 16.2% increase in homeowners insurance rates.

To provide background and trace the history of homeowners insurance filings made by the Rating Bureau since January 1973, when Commissioner of Insurance John Randolph Ingram

assumed the duties of his office, the record on appeal disclosed the following:

1. On 8 January 1973, there was a homeowners filing substantially similar to the one now involved requesting a net increase in rates. There was an amendment to the filing on 26 January 1973.

2. On 7 March 1973, the Commissioner wrote requesting waiver of the deemer provision and said " . . . a public hearing will be set as soon as my schedule permits."

3. On 9 March 1973, there was a letter from Mr. Aycock to the Commissioner waiving the deemer provision and requesting "that the public hearing be set as soon as practicable."

4. On 22 June 1973, the Bureau withdrew its filing for updating.

5. On 9 April 1974, there was a new homeowners filing requesting a 20% overall increase.

6. On 23 May 1974, the Bureau received from the Commissioner a letter requesting waiver of the deemer provision.

7. On 24 May 1974, the Bureau wrote to the Commissioner waiving the deemer provision.

8. On 24 January 1975, the Bureau wrote to the Commissioner withdrawing the filing of 9 April 1974.

9. On 10 February 1975, the Bureau wrote to the Commissioner making a filing very similar to the filing involved here and making a request for an overall increase of 16.2%.

10. On 12 February 1975, the Bureau received an acknowledgment that the filing had been received and would be reviewed.

11. On 8 April 1975, the Bureau received a letter from the Commissioner requesting waiver of the deemer provision.

12. On 10 April 1975, the Bureau wrote to the Commissioner as follows:

> "Pursuant to action of the Governing Board of this Bureau, the captioned filing dated February 10, 1975, is hereby withdrawn.

This action was taken on the advice of the general counsel of the Bureau for the primary purpose of avoiding possible controversy at this time about the effect of the operation of the deemer provision of the Statute (G.S. 58-131.1) or about the effect of a waiver by the Bureau."

13. The Commissioner offered the testimony of the Deputy Commissioner of the Fire and Casualty Division, which tended to show that the Commissioner had conducted a "public hearing" on a filing relating to extended coverage insurance. In fact on 11 April 1975, the Commissioner issued a Letter Order to the Bureau in connection with a pending filing relating to extended coverage insurance. On the 30th day of April, 1975, the Commissioner issued in that same matter of extended coverage a paper headed "Supplemental Order to Letter Order of April 11, 1975" in which he purported to act after what he contended was a "hearing." This Court held that the Order of the Commissioner be vacated for failure to comply with the notice and hearing provisions of G.S. 58-27.2(a). *Comr. of Insurance v. Rating Bureau,* 29 N.C. App. 237, 224 S.E. 2d 223 (1976).

The filing involved in this hearing by the Rating Bureau on 27 June 1975 contained the following:

Section A—Summary of Revisions

Sectoin B—Material to be Implemented

Section C—Supporting Experience

Section D—Explanatory Material

Section E—Form HO-4 Self Rating Filing Supplement

Section F—Relativities by Amount of Insurance and Form.

The filing proposed a change in deductibles and in premium income which would forecast a prospective rate increase in homeowners insurance equivalent to 16.2%. In an accompanying letter the Rating Bureau advised it was not authorized to waive the deemer provisions of G.S. 58-131.1.

On the 21st day of August 1975, the Commissioner gave the Bureau notice of a public hearing on the proposed revisions. A Notice of Public Hearing, approved by the Commissioner of Insurance, was published, reciting that the hearing would be

held on October 29 " . . . for the purpose of investigating the adequacy and fairness of existing rates of Homeowners Insurance Policies."

On 3 October 1975, the Bureau wrote to the Commissioner advising of the implementation by the Bureau of the recommended rates not disapproved within 60 days under the deemer clause.

By letter dated 6 October 1975, the Commissioner protested the activation of the deemer provision.

On 8 October 1975, the Rating Bureau effected the 16.2% rate increase.

The hearing was held on 29 October and concluded on the following day. When the hearing was called counsel for the Rating Bureau requested that the record show that "it's the position of the Bureau that the investigation being made as advertised, is an investigation of rates which have been deemed approved." Thereupon, counsel for the Department of Insursurance announced that the staff maintains "that the deemer clause has not taken effect," and then called as a witness R. E. Holcombe "to testify to the general procedure that has been followed for some thirty years in this area."

The witness Holcombe testified that during his nineteen years as a member of the staff of the Department of Insurance the scheduling of a rate hearing has always acted as a stay until the rate request is heard and either approved or disapproved. On cross-examination it was elicited that since 5 January 1973 there had been ten to twelve substantial rate filings by the Rating Bureau, and that only one hearing for a minor farm owners filing had been held and this hearing was not completed.

Carole J. Banfield testified that she was employed as associate actuary and manager of Personal Lines Actuarial Services Division of Insurance Services Office in New York City, and that the matters in this filing were prepared by her or under her supervision. She further testified that since the homeowners insurance program was introduced in North Carolina in 1960 there has been a 4% rate increase, none since 1966; that the average fire loss between 1969 and 1973 has increased 27.2%; that the cost of residential construction has increased 70% since 1968; that in Raleigh wages of bricklayers from

April 1968 to January 1975 increased 57.6%, carpenters 77.1%, electricians 56.6%, painters 53.8%, plasterers 57.1%, plumbers 49.4%, and building laborers 102.6%; that property crime (theft and burglary) in North Carolina increased 137% from 1969 to 1973; that the loss experience of the major writers in North Carolina shows the industry lost 6.2 million dollars in 1974 from homeowners insurance; that in the first six months of 1975, the major companies writing 50% of the homeowners insurance have lost 17% in this State for homeowners insurance; and that the loss trend projected to 15 September 1975 indicates a needed increase of 29.2% instead of the 16.2% requested in this filing.

Charles B. Aycock, Rating Bureau Manager, testified as to various filings made by the Bureau since January 1973. He was cross-examined by the Commissioner as to whether he or members of the Governing Board appeared before the General Assembly in the 1973 Session in opposition to the Commissioner's reinsurance plan and how many insurance companies opposed the plan.

An insurance agent from Kinston testified in support of the filing. An agent from Manteo testified that the rate increase was justified throughout the State except for the Outer Banks.

On 6 November 1975, the Commissioner entered an order. Upon finding so-called facts which consisted primarily that the Rating Bureau filing was based on data which was "unsupported" or "were not collected under the approved statistical plan for ratemaking" and upon making so-called conclusions of law that the Commissioner had not approved or deemed approved the filing, that the revised rates applied on 8 October 1975 by the Bureau were illegal, and that the filing was improper, unreasonable and not in the public interest, he ordered:

> "1. That the filing submitted June 27, 1975 is hereby disapproved.
>
> 2. That the rates in effect as of June 27, 1975, continue in effect.
>
> 3. That premiums illegally collected after October 8, 1975 in excess of the rate in effect on June 27, 1975 shall be promptly refunded."

The Rating Bureau filed exception and gave notice of appeal.

Attorney General Edmisten by Assistant Attorney General Isham B. Hudson, Jr., for plaintiff appellee.

Joyner & Howison by William T. Joyner, Henry S. Manning, Jr., and James E. Tucker for defendant appellant.

CLARK, Judge.

The Fire Insurance Rating Bureau was established in 1945. Its jurisdiction, powers and duties are defined in G.S. 58-125 through 58-131.9. Every insurance company authorized to insure against loss by fire, lightning, windstorm, etc., is required to become a member of the Bureau and to file annually its underwriting experience in the State.

We first consider the validity of the Rating Bureau's application of the deemer provision (G.S. 58-131.1) in effecting the 16.2% increase in homeowner rates as filed.

G.S. 58-131.1 provides as follows:

> "*Approval of rates.*—No rating method, schedule, classification, underwriting rule, bylaw, or regulation shall become effective or be applied by the Rating Bureau until it shall have been first submitted to and approved by the Commissioner. Provided, that a rate or premium used or charged in accordance with a schedule, classification, or rating method or underwriting rule or bylaw or regulation previously approved by the Commissioner need not be specifically approved by the Commissioner. Every rating method, schedule, classification, underwriting rule, bylaw or regulation submitted to the Commissioner for approval shall be deemed approved, if not disapproved by him in writing within 60 days after submission."

The holding of public hearings on rate filings is controlled primarily by G.S. 58-27.2(a) and the rules and regulations made by the Insurance Advisory Board pursuant to the authority granted by G.S. 58-27.1(c). Clearly these statutes and rules require the Commissioner of Insurance in acting upon a rate filing to hold a public hearing on such proposal after notice in accordance with the rules and regulations.

In *Comr. of Insurance v. Rating Bureau*, 29 N.C. App. 237, 224 S.E. 2d 223 (1976), the Bureau filed on 6 January 1975, for a reduction in extended coverage and windstorm insurance rates. The filing was withdrawn by the Bureau on 6 March 1975. On 11 April 1975, by letter the Commissioner notified the Bureau that pursuant to G.S. 58-131.2 the reduction of 19% plus an additional decrease of 3.4% was approved. In vacating the order, the Court stated:

> " . . . Insofar as this statutory requirement for a public hearing may be repugnant to what the parties have in their correspondence sometimes referred to as the 'deemer provisions' of G.S. 58-131.1, the provisions of G.S. 58-27.2(a) mandating the public hearing must prevail. When two statutes are in conflict and cannot reasonably be reconciled, the statute last enacted repeals the earlier statute to the extent of the repugnancy, even absent a specific repealing clause. . . . As above noted, G.S. 58-27.2(a) was enacted in 1949, while G.S. 58-131.1 was enacted in 1945. Therefore, whatever the legal effect of a 'waiver' by the Fire Insurance Rating Bureau of the 'deemer' provisions of G.S. 58-131.1 may be, it is clear that neither the Rating Bureau nor the Insurance Commissioner may lawfully dispense with the public hearing in cases in which a public hearing is mandated by G.S. 58-27.2(a) . . . . " 29 N.C. App. at 246, 224 S.E. 2d at 228.

[1] Although the factual situation in the case before us differs considerably from that in the case above cited, the rationale therein is applicable here. Under G.S. 58-27.2(a) a public hearing was required on the rate filing by the Rating Bureau on 27 June 1975, and this requirement prevails over any repugnant provisions of the "deemer provisions" of G.S. 58-131.1. Further, the statutory objective of fixing insurance rates which are fair for both the public and the insurance carriers must be considered in construing these statutes. Fair rates can be fixed best after a hearing on the merits rather than by waiver or default under the deemer provision. We think the legislature intended that the Commissioner have a maximum of 60 days within which to study the Bureau's filing and to determine whether the filing establishes a fair rate or there is a need for a hearing to fix fair rates; and that if the Commissioner determines the need for a hearing on the merits, it is his duty to fix in a reasonable time a hearing date after notice, and when so

fixed the deemer provisions are stayed. We, therefore, conclude that the statutes do not require that the Commissioner of Insurance, after a rate filing, give notice, conduct a hearing, and make his ruling within 60 days from the date of filing to avoid the "deemer provision"; and that if the Commissioner, within 60 days of the filing, gives notice of public hearing on the filing, the "deemer provisions" are stayed pending the hearing and his ruling.

Having ruled that the Rating Bureau did not have the authority to put into effect the 16.2% rate increase under the deemer provisions of G.S. 58-131.1, we do not pass upon the Bureau's second assignment of error that the Commissioner erred in holding that the effected rates were unfair and discriminatory.

The Rating Bureau's third and last assignment of error is as follows:

> "The Commissioner erred and thereby deprived appellant and its members of their constitutional rights to a fair hearing by his conduct prior to and during the said hearing, by his arbitrary, capricious and unreasonable decisions during the conduct of the hearing and by his failure to make any effort to comply with the mandate of the governing statute G.S. 58-131.2 to determine what would be rates for the future reasonably designed to produce a fair profit." G.S. 58-131.2, in pertinent part, provides as follows:
>
> "*Reduction or increase of rates.*—The Commissioner is hereby empowered to investigate at any time the necessity for a reduction or increase in rates. If upon such investigation it appears that the rates charged are producing a profit in excess of what is fair and reasonable, he shall order such reduction of rates as will produce a fair and reasonable profit only.
>
> If upon such investigation it appears that the rates charged are inadequate and are not producing a profit which is fair and reasonable, he shall order such increase of rates as will produce a fair and reasonable profit.
>
> In determining the necessity for an adjustment of rates, the Commissioner shall give consideration to all reasonable and related factors, to the conflagration and catastrophe hazard, both within and without the State, to the

past and prospective loss experience, including the loss trend at the time the investigation is being made, and in the case of fire insurance rates, to the experience of the fire insurance business during a period of not less than five years next preceding the year in which the review is made."

In a landmark decision which has been quoted and cited with approval in many subsequent decisions by the appellate courts of this State and other States, *In re Filing by Fire Ins. Rating Bureau,* 275 N.C. 15, 38, 165 S.E. 2d 207, 223 (1969), the court discussed with thoroughness and clarity the duties of the Commissioner "in fixing such rates as will produce 'a fair and reasonable profit' and no more." No useful purpose would be served in quoting further from this definitive decision.

The power to fix insurance rates which the legislature has conferred upon the Commissioner of Insurance is an awesome one, and one which carries with it a corresponding duty.

The record on appeal discloses that since he took the oath of office in early January 1973, the Commissioner has failed repeatedly to conduct hearings on numerous filings by the Rating Bureau, including a filing for reduction of rates for extended coverage and windstorm insurance. The record on appeal further discloses that the Commissioner in the hearing on the filing which is the subject of this proceeding refused, contrary to the provisions of G.S. 58-131.2, to consider competent evidence of losses and operating expenses of the insurance industry, and reasonable and related factors in making his own projections into the future. The Commissioner and the staff of the Insurance Department failed to cross-examine the witness offered by the Rating Bureau on the merits of its filing, offered no evidence to challenge the voluminous and detailed data submitted in the Bureau filing even though the data clearly indicated that the homeowners insurance rates, last increased in 1966, were so low that the insurers could engage in business only at a loss.

[2] We conclude that the order of the Commissioner of Insurance is contrary to law and the evidence, is unreasonable and arbitrary, and must be vacated.

Although the Rating Bureau had no authority to effect on 8 October 1975 the 16.2% rate increase under the deemer provision, it presented a prima facie case supporting its filing and

offered competent evidence that the rate for homeowners insurance in effect prior to that date was unfair and confiscatory. Since the record on appeal discloses persistent procrastination, unfairness, and partisan procedures and decisions on the part of the Commissioner, we, in the exercise of the inherent power of the court, do not invalidate the effected 16.2% rate increase by the Rating Bureau. We, therefore, continue in effect this rate increase until the Commissioner of Insurance performs his statutory duty in further proceedings and fixes premium rates for homeowners insurance which will produce a fair and reasonable profit and no more.

The order of the Commissioner of Insurance is hereby vacated, and this cause is remanded to the Commissioner of Insurance for further proceedings in accordance with this opinion.

Vacated.

Judge VAUGHN concurs in part.

Judge MARTIN concurs in the result.

Judge VAUGHN concurring in part:

I concur only in that part of the opinion which reverses and vacates the order of the Commissioner as being unsupported by material and substantial evidence in view of the entire record.

BERRY B. SELF, PLAINTIFF, AND MAE I. SELF, INTERVENOR PLAINTIFF, v. LIFE ASSURANCE COMPANY OF CAROLINA AND PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, DEFENDANTS

No. 7619SC178

(Filed 1 September 1976)

Insurance § 44— group health and disability insurance——full-time employee — person working reduced hours

An employee whose work schedule was reduced at his request from six days a week to two days a week so that his earnings would not exceed the maximum amount allowed for him to receive full Social Security benefits was not "employed on a full-time basis"

within the meaning of a group hospital, medical and disability insurance policy issued to his employer.

APPEAL by defendant, Life Assurance Company of Carolina, from *Collier, Judge.* Judgment entered 16 October 1975 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 7 June 1976.

Plaintiff, Berry B. Self, brought this action to recover hospital, medical, and disability benefits under a group insurance policy issued to his employer, Wagner Woodcraft, Inc., by the defendant, Life Assurance Company of Carolina. Alternatively, he sought to recover as a dependent of his wife under a group insurance policy issued to his wife's employer by the defendant, Provident Life and Accident Insurance Company. His wife was added as an additional party plaintiff in the action against Provident.

The case was tried by the court without a jury. The facts pertinent to the questions presented by this appeal, as established by the pleadings, pre-trial stipulations, exhibits, and uncontradicted evidence, are not in substantial dispute, and may be summarized as follows:

On 1 January 1970 Life Assurance Company of Carolina issued to Wagner Woodcraft, Inc., designated as the "Policyholder," its group insurance policy No. GO 173 by which Carolina agreed to pay certain hospital, medical, and disability benefits "with respect to the several persons insured" thereunder. Under the heading. "Eligibility for Insurance," the policy provided:

> "The classes of persons eligible for insurance hereunder (herein called the eligible classes) shall be all persons directly employed on a full-time basis and compensated for services by the Policyholder."

Under the heading, "Termination of Group Accident and Health Insurance," the policy provided:

> "The Group Accident and Health Insurance of any person hereunder shall automatically cease if his employment or membership in the classes eligible for such insurance hereunder terminates. . . .

* * *

"Cessation of active work in the eligible classes will be deemed to constitute termination of employment. . . .

* * *

"Termination of insurance because of termination of employment shall be effective automatically on the date of such termination of employment."

Plaintiff commenced working for Wagner in 1969. Until 19 April 1974 he worked an average of more than 40 hours per week. On 27 March 1974 he became 62 years old. In April 1974 he asked his employer for permission to work a reduced schedule of hours so that his wages would not be greater than $2,400.00 in that year. By doing this he could qualify to receive the full Social Security benefits then available to him. Wagner agreed, and after 19 April 1974 plaintiff began working on a reduced schedule which called for him to work 8 hours per day for two consecutive days per week, for a total of 16 hours per week. Beginning the work week ending 26 April 1974 plaintiff worked 16 hours per week every week up to and including the week ending 11 October 1974, except for the week ending 24 May 1974, when he worked only 2 hours, and the weeks ending 28 June, 2 August, 23 August, 30 August, 6 September, 20 September, and 27 September, during which weeks he did not work at all. Thoughout this period Wagner's business was good and work was available for its employees on an average of more than 40 hours per week.

In October 1974 plaintiff became ill, resulting in his hospitalization from 14 October 1974 to 4 November 1974, from 20 November 1974 to 3 December 1974, and from 9 December 1974 to 27 December 1974. As a result of his illness, plaintiff incurred hospital and medical expenses totalling $6,100.91. Plaintiff has not been able to work since the time of his illness, and at the time of the trial in October 1975 he was still disabled and suffering ill health.

Wagner paid all premiums for coverage of its employees, including the plaintiff. Coverage for dependents of an employee was available if the employee himself was covered, the premiums for coverage of the defendants being payable by the employee through payroll deductions. Life Assurance Company of Carolina sent Wagner each month a bill for the total amount of premiums due together with a list of all employees, showing which ones had coverage for dependents and the amount owed

by each. If an employee ceased work, Wagner's office secretary marked through his name and noted the termination date, and the next month Carolina would remove this employee's name from the bill. Plaintiff's name remained on the monthly list through November 1974, and monthly premiums for his coverage were paid to Carolina by Wagner during that time. Plaintiff paid for coverage on his dependents through weekly payroll deductions by his employer through the week ending 11 October 1974. Thereafter, when he became ill, he paid for an additional six weeks of coverage for his dependents by personal checks payable to his employer, which Wagner accepted and cashed.

In November 1974 the first hospital bill for plaintiff was received by Wagner. When Carolina was notified of receipt of this bill and the request for payment, Carolina for the first time notified Wagner that plaintiff was not entitled to benefits since he was not a full-time employee. Thereafter, in January 1975, Wagner tendered plaintiff its check for $136.96 as a refund for dependent coverage premiums paid by him in 1974.

On plaintiff's total bill of $6,100.91 for hospital and medical expenses, defendant Provident Life and Accident Insurance Company paid $1535.18 in settlement of its liability as a secondary carrier. In making this payment, Provident contended that the primary liability for the remainder of the hospital bills fell on Carolina as the primary insurer.

Other evidence will be referred to in the opinion. The trial court entered judgment making findings of fact and conclusions of law, including the conclusions that plaintiff, at all times pertinent to decision, was "an active employee working full-time" within the meaning of group policy No. GO 173 issued by Carolina to Wagner, that plaintiff was covered by the policy, and that Carolina is liable to plaintiff in the amount of $4,565.73 for medical and hospital expenses and in the amount of $910.00 for weekly disability benefits. From judgment in accord with these conclusions, defendant Life Assurance Company of Carolina appealed.

Archie L. Smith for plaintiff-appellees.

L. P. McLendon, Jr., and E. Norman Graham for defendant, Provident Life and Accident Insurance Company, appellee.

Womble, Carlyle, Sandridge & Rice by John E. Hodge, Jr., for defendant, Life Assurance Company of Carolina, appellant.

PARKER, Judge.

The question presented is whether plaintiff was "employed on a full-time basis" within the meaning of the eligibility clause in appellant's insurance policy at the time his illness commenced. We hold that he was not.

There is no question that plaintiff was so employed when the policy was issued in 1970 and that he remained so employed, and thus within the "classes of persons eligible for insurance," until 19 April 1974. At that time his job status changed radically. On his request, and by agreement with his employer, his regularly scheduled weekly work hours were reduced from 49 hours spread over 6 days per week, which he had been working and which other employees in his department continued to work, to 16 hours spread over 2 days per week. This was done to serve his purposes, not those of his employer. Work was available for him to perform throughout the entire 6 day work week had he wished to do so. That he recognized a radical change occurred in his status is shown by his written statement, introduced into evidence by consent, in which he stated:

> "I retired at 62 years old, and I could only make $2400 a year."

Although this statement, standing alone, would not be determinative of his rights in this case, it is a substantially accurate description of the factual situation which existed after 19 April 1974. In the period of twenty-five weeks which followed his going on the reduced work schedule in April and which ended in October when he ceased work altogether, he worked the reduced schedule during seventeen weeks, during one week he worked only 2 hours, and during the remaining seven weeks he worked no hours at all. We hold that a person, such as the plaintiff in this case, who is scheduled to work only two days a week when other employees work six, and who actually works even less than this limited schedule, cannot reasonably be considered as being "employed on a full-time basis."

In so holding we are, of course, advertent to the rule of construction that any ambiguity or uncertainty as to the meaning of words used in an insurance policy should be resolved against the insurance company, which drafted the contract, and in favor of the policyholder or the beneficiary. "However, ambiguity in the terms of an insurance policy is not established

by the mere fact that the plaintiff makes a claim based upon a construction of its language which the company asserts is not its meaning. No ambiguity, calling the above rule of construction into play, exists unless, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend." *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E. 2d 518, 522 (1970). As above noted, we cannot agree that the key words in the policy now before us, which specified that persons eligible for insurance "shall be all persons directly employed on a full-time basis," are reasonably susceptible to the meaning given them by the trial court and for which the appellees contend. Whatever uncertainty might exist when those words are applied to other factual situations, we perceive no ambiguity and experience no uncertainty in applying them in the factual context of the case now before us.

The policy provided that the policyholder, Wagner, should furnish the insurance company with monthly reports of all changes in status, as they occur, of the persons insured thereunder "affecting the amounts of their insurance and all terminations of insurance, together with the date of each such change or termination." Among its findings of fact, the trial court found that "Wagner furnished no such report to Life of Carolina on any change in the employment status of Self." It also found as a fact "that records of scheduled hours of employment for each employee were not required by Life of Carolina, or if required, were not furnished by Wagner, [thus leaving the matter of determining which employees were covered under the policy up to Wagner]." The bracketed portion of this finding is not a finding of fact, but is the trial court's conclusion of law. As such, we find it to be erroneous. Nothing in the facts found by the court or disclosed in the record in this case supports the conclusion that plaintiff's employer, Wagner, had the power to determine which of its employees were covered under the policy, except as, in its capacity as employer, it might specify their duties and fix their schedules of employment. The language of the policy itself determined which employees were covered, and Wagner had no power to change that language. Certainly, Wagner could acquire no such power to amend the policy or to determine who should and who should not be covered simply by failing to comply fully with the duty imposed on it by the policy to furnish the insurance company with monthly

reports. Indeed, the policy in express terms provides directly to the contrary. Under the heading, "Insurance Records," the policy contains the following:

> "Failure of the Policyholder to report the names of any persons who have qualified for insurance hereunder in accordance with the prescribed conditions, or failure to report any change in accordance with the provisions hereof, shall not deprive such persons of their insurance nor affect the amounts thereof; nor shall failure to report any termination of insurance of any person be construed as involving or effecting the continuance of such insurance beyond the date of termination determined in accordance with the provisions hereof."

We hold that under the undisputed facts of this case the plaintiff was not, at the time of his illness and hospitalization, a person "employed on a full-time basis" by the Policyholder, and for that reason he was not within the coverage of the policy. The judgment appealed from is

Reversed.

Judges HEDRICK and ARNOLD concur.

JUNE RODD T/A THE STUDIO OF HAVELOCK v. W. H. KING DRUG COMPANY

No. 763SC237

(Filed 1 September 1976)

1. **Damages § 12— general and special damages — pleadings**

General damages, which are the natural and necessary result of a wrong, are implied by law and may be recovered under a general allegation of damages; special damages, those which do not necessarily result from the wrong, must be pleaded, and the facts giving rise to the special damages must be alleged so as fairly to inform the defendant of the scope of plaintiff's demand. G.S. 1A-1, Rule 9(g).

2. **Damages § 12; Uniform Commercial Code § 21— operating losses — pleadings — breach of warranty of merchantability**

Operating losses are special damages which must be alleged under G.S. 1A-1, Rule 9(g) and are consequential damages which are recoverable under G.S. 25-2-715(2) if the seller knew or reasonably

could have foreseen that the probable result of a malfunctioning product would be such operating losses; the pleadings and evidence in this case did not permit recovery of operating losses by plaintiff for breach of warranty of merchantability of a photographic color enlarger.

3. **Damages § 16; Uniform Commercial Code § 21— breach of warranty — damages — inadequate instructions**

The trial court's instructions did not adequately declare and apply the law as to damages recoverable for breach of warranty of merchantability of a photographic color enlarger.

ON *writ of certiorari* to review proceedings before *Browning, Judge.* Judgment entered 30 May 1975, Superior Court, CRAVEN County. Heard in the Court of Appeals 14 June 1976.

In this action to recover damages in the sum of $30,000.00 for breach of implied warranty of merchantability in the sale of a color processing unit by defendant to plaintiff for use in her photography studio, defendant denied the breach and counterclaimed to recover $870.97 for goods sold.

At trial evidence for the plaintiff tended to show that the purchase price of the color processing unit, which included an enlarger, was $6,006.24; the unit was delivered 15 March 1969; the enlarger malfunctioned from the beginning and continuously thereafter until it was corrected by the manufacturer, who found defective wiring, and returned to plaintiff on 29 September 1969. The unit then functioned properly. During this period plaintiff was unable to duplicate and process color photographs. Plaintiff's net income was $697.75 in 1965, $213.79 in 1966, $1,285.44 in 1967. She had a net loss of $285.59 in 1968, $4,619.91 in 1969, and $6,625.86 in 1970. She closed the studio in December 1970, at which time she was indebted for rent, insurance and photography equipment and supplies in the total sum of $2,111.65. Plaintiff testified that her losses began with the malfunctioning of the color enlarger, but she waited until December 1970 to close her studio because she "thought King Photo Supply was going to help me with the cost of some of the losses incurred because of the malfunction."

Defendant's evidence tended to show that it had received numerous telephone calls from plaintiff relative to malfunctioning of the enlarger, and that defendant responded to these calls and attempted to correct the defects but was unable to do so. The unpaid balance of her account was $870.97.

The jury found a breach of warranty, and rendered verdict for plaintiff in the sum of $30,000.00, and for defendant on its counterclaim for $870.97. The trial court denied defendant's motion to set aside the verdict. From judgment on the verdict defendant appealed.

Ward, Tucker, Ward & Smith, P.A. by David L. Ward, Jr., and Thomas R. Crawford for plaintiff appellee.

Jacob W. Todd for defendant appellant.

CLARK, Judge.

Since all of the evidence supports the finding by the jury that there was a breach of warranty in that there was a defect in the color enlarger purchased by plaintiff from defendant for use in her commercial photography business, we find that the primary question before this Court relates to damages. The defendant assigns error in the charge of the court on the damage issue and the denial of the defendant's motion to set aside the verdict.

In her complaint plaintiff alleged damages as follows:

"(15) That, because of defendant's breaches of warranty and failure to take such steps as necessary to correct the defects in the manufacture of the enlarger, plaintiff suffered extensive and severe damages, in the amount of THIRTY THOUSAND and No/100 ($30,000.00) DOLLARS, which such damages include but are not limited to:

(a) the purchase price of the enlarger;

(b) lost profits and potential earnings;

(c) costs of replacing numerous items of equipment burned out or destroyed by the defective operation of the enlarger;

(d) travel, telephone and other communication and transportation costs incurred by plaintiff and her agents and employees in their efforts to fix the defective enlarger and encourage defendant to do likewise;

(e) other incidental and consequential damages to which the plaintiff may be entitled under the provisions of North Carolina General Statutes Sec. 25-2-715."

Before filing an answer defendant filed a motion for a more definite statement by the plaintiff of damages. The motion was denied. Defendant then filed a motion for partial summary judgment by "dismissing this action as to items (b) and (e) in paragraph 15 of the complaint," supporting its motion by the complaint and the deposition (not a part of the record on appeal) of the plaintiff. This motion was allowed and the court ordered that "plaintiff have and recover nothing of the defendant on account of lost profits, potential earnings or consequential damages." Plaintiff excepted.

The plaintiff contends that her evidence established that as a result of the malfunction of the color enlarger for the period between the date of original delivery on 15 March 1969, and the date of return delivery after repair on 29 September 1969, she suffered such operating losses that she had to close her commercial photography business in December 1970; that she was entitled to recover for the operating losses during 1969 and 1970, for the debts which she owed when she closed her studio in December 1970, for the cost of the color processing unit in the sum of $6,006.24, and for the reasonable value of her services during 1969 and 1970 in the sum of $10,400.00, all amounting to the total sum of $30,627.44, and that these various elements of damage support the jury award of damages in the sum of $30,000.00.

In accordance with prior North Carolina law, under the Uniform Commercial Code (G.S. 25-2-314), there is an implied warranty that the goods sold are merchantable, unless there is an exclusion or modification of warranty as provided by G.S. 25-2-316. The requirements of "merchantability" are spelled out in detail in Subsection (2) of G.S. 25-2-314, which includes the prior case law definition that the personal property must be reasonably fit for the purposes for which sold. See *Swift & Co. v. Aydlett,* 192 N.C. 330, 135 S.E. 141 (1926); *Aldridge Motors, Inc. v. Alexander,* 217 N.C. 750, 9 S.E. 2d 469 (1940) for prior law. And see *Performance Motors, Inc. v. Allen,* 280 N.C. 385, 186 S.E. 2d 161 (1972).

Where there is a breach of the implied warranty of merchantability the Uniform Commercial Code provides for recovery by the buyer of both "general" damages, which are implied by law, and "special" damages, which arise from the special circumstances of the case and must be properly pleaded.

General damages for seller's breach with regard to accepted goods are provided for by G.S. 25-2-714(2) as follows:

> "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

Special damages are provided for by G.S. 25-2-715 as follows:

> *"Buyer's incidental and consequential damages.*—(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
>
> (2) Consequential damages resulting from the seller's breach include
>
> (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
>
> (b) injury to person or property proximately resulting from any breach of warranty."

[1] The distinction between general and special damages is principally important with regard to the pleadings and quantum of proof. General damages are the natural and necessary result of the wrong, are implied by law, and may be recovered under a general allegation of damages. But special damages, those which do not necessarily result from the wrong, must be pleaded, and the facts giving rise to the special damages must be alleged so as to fairly inform the defendant of the scope of plaintiff's demand. G.S. 1A-1, Rule 9(g) provides that "When items of special damage are claimed each shall be averred." This rule codifies established North Carolina law. See Shuford, N. C. Civil Practice and Procedures, Sec. 9-10.

Under the pleadings and the evidence in this case, the plaintiff may recover general damages as provided by G.S. 25-2-714(2) for breach of warranty (i.e., the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted), and incidental damages as provided by G.S. 25-2-715(1) for expenses reasonably incurred in connection with handling the defective color enlarger. Considering the evidence in the light most favorable to plaintiff, general damages would not exceed the cost of the color processing unit in the sum of $6,006.24. Although plaintiff offered evidence that expenses were incurred in the handling of the defective color enlarger, such as telephone calls to defendant in her efforts to have the malfunction corrected, she failed to offer evidence of the amount of these expenses.

[2] Operating losses are special damages which must be alleged under G.S. 1A-1, Rule 9(g) and are consequential damages which are recoverable under G.S. 25-2-715(2) if defendant knew or reasonably could have foreseen that the probable result of a malfunctioning color enlarger would be such operating losses. See *Gurney Industries, Inc. v. St. Paul Fire & Marine Ins. Co.*, 467 F. 2d 588 (4th Cir. 1972).

In the case before us, it does not appear whether the basis for the ruling by the trial court in its "partial summary judgment" that plaintiff could not recover "lost profits, potential earnings or consequential damages" was plaintiff's failure to allege special damages as required by G.S. 1A-1, Rule 9(g), or her failure to offer proof in her deposition that the claimed damages proximately resulted from the defective enlarger as required by G.S. 25-2-715(2)(a). In any event, plaintiff did not move before trial to amend her complaint to allege special or consequential damages, and did not move at trial to amend to conform to the evidence under G.S. 1A-1, Rule 15. Clearly, the pleading and the evidence limited plaintiff to the recovery of general damages for breach of warranty under G.S. 25-2-714(2) and do not support the jury award of $30,000.00 in damages to the plaintiff.

[3] On the damage issue the trial court instructed the jury in pertinent part as follows:

> "Now it is a general rule of law that the only damages which may be recovered are those damages which are the

proximate result of the breach. In considering those damages you may consider the following types of damages: The out of pocket expenses, repairs, the cost of the equipment purchased, and incidental expenses. In considering these damages you may not consider loss of profits, potential earnings, and consequential damages. . . . "

These instructions do not adequately declare and explain and apply the law to the damage features of the case as required by G.S. 1A-1, Rule 51(a).

We find no error in the trial other than on the damage issue, and on this issue only there must be a new trial.

The case is remanded for a new trial on the issue of what damages the plaintiff is entitled to recover from the defendant.

Remanded.

Judges MORRIS and VAUGHN concur.

CALVIN SHULER v. TALON DIVISION OF TEXTRON AND AETNA CASUALTY & SURETY CO.

No. 7527IC1019

(Filed 1 September 1976)

Master and Servant § 77— workmen's compensation — no change of condition — no additional recovery for medical expenses

Where an award directs the payment of both compensation and medical expenses, then the injured employee has one year (two years effective 1 July 1974) from the last payment of compensation pursuant to the award in which to file claim for further compensation upon an alleged change of condition; therefore, claimant was not entitled to additional recovery for medical expenses where he failed to show a change of condition, but showed only a change in his doctor's opinion concerning the duration of his condition. G.S. 97-47.

APPEAL by plaintiff from the North Carolina Industrial Commission. Award entered 25 August 1975. Heard in the Court of Appeals 6 April 1976.

On 27 November 1970 claimant was injured by an accident arising out of and in the course of his employment. Upon a

hearing before Deputy Commissioner Roney in Gastonia on 2 November 1972, the following conclusion of law and award were entered:

CONCLUSION OF LAW

"The serious facial and bodily disfigurement suffered by claimant may fairly be presumed to work a diminution of claimant's future earning capacity, the value of which is $3,500.00. N.C.G.S. 97-31(21)(22); *Arrington v. Stone & Webster Eng'r. Corp.*, 264 N.C. 381, 140 S.E. 2d 759 (1965).

* * *

"Based upon the foregoing findings of fact and conclusions of law, the undersigned enters the following

AWARD

"Defendants will pay claimant compensation for disfigurement in the amount of $3,500.00 in a lump sum, subject to an attorney fee hereinafter approved.

"Defendants will pay all medical expenses arising as a result of claimant's injury by accident when bills for same have been submitted to and approved by the Industrial Commission.

"Defendants will deduct from claimant's award and pay directly to his attorney a fee in the amount of $350.00.

"Defendants will pay all costs incurred, including an expert witness fee in the sum of $45.00 to Dr. D. J. Deas."

It was stipulated by the parties that a copy of Industrial Commission Form 28B along with compensation awarded by Deputy Commissioner Roney were timely received by claimant. Form 28B, dated 17 November 1972, dicloses: (1) that claimant's last compensation check was forwarded on 17 November 1972; (2) that total compensation paid was the $3,500.00 awarded by Deputy Commissioner Roney, plus $1,064.29 previously paid; (3) that total medical pay was $9,014.10; (4) that this report closes the case including final compensation payment; and (5) that claimant acknowledged receiving a copy of this Form 28B, dated 17 November 1972.

On 9 March 1973 claimant forwarded a letter to Deputy Commissioner Roney wherein he advised that he was still re-

ceiving medical treatment but that the carrier was declining to pay his medical bills. He asked for clarification of the carrier's responsibility. Deputy Commissioner Roney replied, advising claimant that he should have his attorney contact the carrier. He further suggested that a hearing might be necessary to resolve the controversy.

On 24 May 1973 claimant directed a letter to Deputy Commissioner Roney advising that the carrier refused to pay his medical bills. In this letter he stated: "Mr. Roney, it is my opinion this controversy will not be settled unless it is done so by the Industrial Commission. If you can help me in anyway to resolve this controversy would you please do so?" By letter dated 11 June 1973 Deputy Commissioner Roney advised claimant:

> "If the carrier is not paying those medical expenses that in your opinion are covered by the Opinion and Award filed by me on November 9, 1972 you should write a letter to the Secretary of the Industrial Commission, Mr. J. R. Mitchell, and request that your claim be assigned for hearing to determine whether there are current unpaid medical expenses for which the carrier is liable. All future correspondence with regard to this matter should be directed to Mr. J. R. Mitchell, North Carolina Industrial Commission, Albemarle Building, 325 North Salisbury Street, Raleigh, N. C. 27611.
>
> "I received a letter from Mr. Collins, a copy of which was sent to you, which indicated a willingness by Aetna Casualty and Surety Company to pay continuing medical expenses incurred by you as a result of the compensable injuries. Furthermore, I note from the file that the Industrial Commission approved a $76.20 bill from the Catawba Pharmacy. Prior to requesting a hearing perhaps you should contact Mr. Collins by letter in an effort to avoid the inconvenience and expense of another hearing."

Thereafter the carrier paid claimant's medical expenses until November 1973, at which time it discontinued all payments. By letter dated 22 May 1974 claimant, through counsel, requested rehearing before the Commission to determine whether the carrier should continue to pay for the medical and drug expenses of claimant.

The matter was set for further hearing; and part of the testimony of Dr. David Deas, a medical expert specializing in psychiatry, was developed as follows:

"My present prognosis of Mr. Shuler has not changed from the original prognosis that appeared in the original hearing of this matter before the Industrial Commission. I have modified that prognosis as far as the duration of treatment required. I believe I felt that he probably would not require more than six months or a year further treatment at that time."

* * *

"I have continued to treat him to this date, and it appears to me that his condition is chronic and treatment will continue on that basis on an indefinite basis."

* * *

" . . . My experience is that Mr. Shuler requires these drugs in a continuous, on a continuous basis in order to remain stable and to continue to be able to function and work.

"The condition which I diagnosed Mr. Shuler and for which I am treating him appears to be chronic. That means it has no foreseeable end. I do not feel that Mr. Shuler's condition has changed so much as my impression of his illness has changed. That would be a change in my prognosis. His condition that I described in November 2, 1972, has waxed and waned. There is no essential change to the severity of his depression and skin condition since that time over-all. I believe his condition is permanent. I testified in November of 1972 that it was not permanent. I do not believe that his condition has changed since November, 1972, but that my opinion has changed. Again my changing opinion is due to the chronicity of Mr. Shuler's illness."

By opinion and award filed 4 April 1975 Deputy Commissioner Roney found facts approximately in accord with the foregoing testimony of Dr. Deas and, in addition, made the following findings, conclusion, and award:

"10. The treatment which claimant has been and is receiving is necessary to keep him in the work force.

"11. Throughout the period of Dr. Deas' treatment claimant's condition has waxed and waned but has not

changed. The waxing and waning of the depressive neurosis has been secondary to discontinuance of drug therapy and bleeding sores.

"12. Claimant's claim for continuing psychiatric treatment is not based upon an alleged change in condition. The chronic depressive neurosis is a direct result of the injury by accident and control thereof tends to lessen the period of disability by keeping claimant in the work force.

"13. Claimant's work history since 2 November 1972 is not a part of the record. No finding with regard thereto is possible.

"14. Claimant is not guilty of laches.

"15. On 29 May 1973 the Commission received a letter dated 24 May 1973 addressed to the undersigned from claimant. The letter indicated that claimant was continuing to experience difficulty with the sores that would not heal and that the defendant carrier had stopped paying drug bills. Claimant thereupon stated: 'If you can help me in anyway to resolve this controversy would you please do so?' (sic) While this letter is not a claim denominated as such, it is nonetheless sufficient to toll the running of the one-year statute of limitations pertaining to claims based upon change in condition or newly discovered evidence. Claimant therefore timely filed a claim pursuant to the provisions of N.C.G.S. 97-47 on 29 May 1973.

* * * * *

"The foregoing findings of fact and conclusions of law engender the following additional

CONCLUSIONS OF LAW

"1. The letter received by the Commission on 29 May 1973 from claimant addressed to the undersigned which contained information regarding continued treatment and cessation by defendant carrier of payment of drug bills and a request for help constituted the filing of a claim and thereby tolled the running of the one-year statute of limitations regarding review of final awards. N.C.G.S. 97-47. Claimant's claim for continuing medical care at the expense of defendants is not barred.

"2. The psychiatric and medical treatment that claimant continues to receive tends to lessen the period of disability because without said treatment claimant would become unable to work and thereupon drop out of the work force. N.C.G.S. 97-25.

* * * * *

"Based upon the foregoing findings of fact and conclusions of law, the undersigned enters the following

AWARD

"Defendants shall provide and claimant shall accept psychiatric and medical care so long as said treatment keeps claimant in the work force, thereby tending to lessen the period of disability.

"Defendants shall pay all costs incurred."

Upon appeal by defendants the Commission, in an opinion by Chairman Brown, reversed, saying:

"The Full Commission after consideration of argument, brief, and the complete record of the case, holds the plaintiff's claims asserted in the hearing before Deputy Commissioner Roney are barred by the provisions of G.S. 97-47, both by the passage of time and by the fact of no change of condition."

Claimant appealed to the Court of Appeals.

Joseph B. Roberts III for the claimant.

Golding, Crews, Meekins, Gordon & Gray, by Michael K. Gordon, for the defendants.

BROCK, Chief Judge.

We have not considered upon this appeal the items stricken by the Industrial Commission from the proposed record on appeal, and later sought to be added to the record on appeal by claimant. Settlement of the record on appeal is the function of the trial tribunal, and its rulings thereon will not be reviewed in the absence of a showing of a manifest abuse of discretion. No such showing has been made on this appeal.

Claimant attacks the ruling of the Industrial Commission on three grounds. First, claimant argues that the twelve-month

limitation in G.S. 97-47 does not apply to a hearing to enforce an order entered under G.S. 97-25 because he is not seeking additional compensation on the grounds of a change of condition. Secondly, claimant argues that even if the twelve-month limitation of G.S. 97-47 is applicable, claimant's letter to Deputy Commissioner Roney dated 24 May 1973 (received by the Commission on 29 May 1973) was within twelve months of the last payment of compensation and constituted the filing of a claim, thereby tolling the running of the twelve-month limitation. Thirdly, claimant argues that even if the twelve-month limitation of G.S. 97-47 is applicable, and even if his letter dated 24 May 1973 does not constitute the filing of a claim, defendants should be held to be equitably estopped to plead the passage of the twelve-month limitation.

Although we acknowledge that the law of estoppel applies in compensation proceedings, *Willis v. Davis Industries,* 280 N.C. 709, 186 S.E. 2d 913 (1972), and that there are instances where an informal letter may serve as a claim for compensation or for a modification of an award on the grounds of change of condition, we do not feel it is necessary to decide whether either of those principles is applicable to the present case.

Claimant's argument that G.S. 97-47 is not applicable because he seeks only continued payment of medical expenses, not additional compensation on the ground of change of condition, ignores the clear wording of the last phrase of G.S. 97-47, which reads: " . . . except that in cases in which *only* medical or other treatment bills are paid, no such review shall be made after 12 months from the date of the last payment of bills for medical or other treatment, paid pursuant to this Article." (Emphasis added.) Thus, if this were a case in which only medical expenses had been awarded in the original award, G.S. 97-47 would apply. Obviously this is not a case where *only* medical or other treatment bills were paid. A lump sum payment of $3,500.00 as compensation for diminution of earning capacity was ordered in the original award in November 1972. Therefore claimant's procedure was inextricably tied to G.S. 97-47, which requires notice within twelve months of the last payment of compensation and a showing of change of condition. Where an award directs the payment of both compensation and medical expenses, then the injured employee has one year (two years effective 1 July 1974, G.S. 97-47 as amended) from the last payment of compensation pursuant to the award in which to file

claim for further compensation upon an alleged change of condition. Where the award directs the payment of medical bills only, an extension of the award would not be permissible unless there is a showing of change of condition since the original award. *Biddix v. Rex Mills,* 237 N.C. 660, 75 S.E. 2d 777 (1953). If the legislature had intended that no showing of a change of condition was necessary where only additional medical expense payments are sought, it would have so provided.

The evidence shows no change in claimant's condition. The claimant's work record was not shown, and claimant does not assert a change of condition. The deputy commissioner's findings negate a change in claimant's condition. A mere change of the doctor's opinion with respect to claimant's preexisting condition does not constitute a change of condition required by G.S. 97-47. *Pratt v. Upholstery Co.,* 252 N.C. 716, 115 S.E. 2d 27 (1960).

From the doctor's testimony it appears that claimant's condition will require continuous treatment, but claimant has failed to pursue his statutory remedy by showing a change of condition.

We do not decide the question of whether notice of claimant's claim for additional medical expense payments was timely. In our opinion the Commissioner's holding that claimant's failure to show a change of condition bars additional recovery is correct, and is dispositive of the claim.

Affirmed.

Judges VAUGHN and MARTIN concur.

CALVIN SHULER v. GASTON COUNTY DYEING MACHINE COMPANY, A CORPORATION

No. 7627SC202

(Filed 1 September 1976)

1. Limitation of Actions § 4— bodily injury — statute of limitation — effect on claims in existence

Ch. 1157 of the 1971 Session Laws which was ratified on 2 July 1971 and which amended G.S. 1-15 applied to claims in existence but not yet barred when the statute became effective, the sole exception being that the statute should not affect pending litigation; therefore,

G.S. 1-15(b) was applicable to this action which was not commenced until 26 November 1973.

2. **Limitation of Actions § 4— installation of safety device — subsequent injury — time of accrual of action**

Where defendant installed a safety device on machinery in plaintiff's place of employment on 9 February 1970, plaintiff received bodily injuries as a result of the allegedly defective safety device on 27 November 1970, and plaintiff filed his action against defendant on 26 November 1973, plaintiff's action was not barred by G.S. 1-52(5), since his cause of action against defendant accrued at the time the injury was discovered or ought reasonably to have been discovered by plaintiff, whichever first occurred. G.S. 1-15(b).

APPEAL by plaintiff from *Briggs, Judge.* Judgment entered 28 January 1976 in Superior Court, GASTON County. Heard in the Court of Appeals 9 June 1976.

On 9 February 1970 defendant installed a safety device on machinery in the plant of Textron Company. On 27 November 1970 plaintiff, an employee of Textron, was injured while working with the machinery. On 26 November 1973 plaintiff filed this action against defendant seeking damages for his injuries, alleging that defendant was negligent in manufacturing and installing a defective safety device. Defendant answered, denying negligence and pleading defenses, including the statute of limitations.

By agreement, the plea in bar of the statute of limitations was submitted to the court for determination prior to trial. The court, finding that plaintiff's complaint was filed more than three years after the installation of the allegedly defective safety device and concluding as a matter of law that G.S. 1-15(b) does not apply to claims which arose prior to its effective date, sustained the plea in bar and dismissed plaintiff's action.

Roberts, Caldwell and Planer, P.A. by Joseph B. Roberts III, for plaintiff appellant.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston by William E. Poe and Irvin W. Hankins III, for defendant appellee.

PARKER, Judge.

Chapter 1157 of the 1971 Session Laws, which was ratified on 21 July 1971, is as follows:

"Section 1. G.S. 1-15 is hereby amended by adding a new paragraph as subsection (b) and by designating the

first paragraph as subsection (a) so that G.S. 1-15 shall read as follows:

'§ 1-15. Statute runs from accrual of action.—(a) Civil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute.

(b) Except where otherwise provided by statute, a cause of action, other than one for wrongful death, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs; provided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief.'

Sec. 2. This act shall become effective upon ratification and shall not affect pending litigation."

[1] The present action was not commenced until 26 November 1973, which was after the effective date of Ch. 1157, 1971 Session Laws. This action, therefore, was not "pending litigation" when that statute became effective. We find nothing in the statute to manifest a legislative intent that it should not affect claims, such as plaintiff's which were in existence on the effective date of the statute but as to which no litigation was then pending. Had that been the legislative intent, language appropriate for that purpose could easily have been employed. *Trust Co. v. Redwine,* 204 N.C. 125, 167 S.E. 687 (1933), cited by defendant, is not here controlling. The legislative act involved in that case provided it should be "in force and effect *from and after* its ratification" (emphasis added), and the court held the statute to operate prospectively only. Section 2 of Ch. 1157 of the 1971 Session laws provides that the act "shall become effective upon ratification," the sole exception being that it "shall not affect pending litigation." The 1971 act is remedial in nature, and absent a clear manifestation of legislative intent that it apply prospectively only, we hold it applicable to claims in existence and not yet barred when the

statute became effective, the sole exception being that the statute "shall not affect pending litigation." Although an action already barred may not be revived by the legislature, "that body may extend at will the time for bringing actions not already barred by an existing statute." *Jewell v. Price,* 264 N.C. 459, 461, 142 S.E. 2d 1, 3 (1965).

[2] Applying G.S. 1-15(b) in the present case, plaintiff's cause of action against defendant "is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs." In this case that date was 27 November 1970, the date plaintiff received bodily injuries as result of the allegedly defective safety device. The action having been commenced within three years after that date, plaintiff's action is not barred by G.S.1-52(5).

Since we hold G.S. 1-15(b) applicable to the present case, it is not necessary that we pass upon plaintiff's further contention that even without the benefit of that statute, plaintiff's cause of action against defendant accrues only at the date he received bodily injuries. In this connection, plaintiff points out that he had no direct contract or dealings with defendant, and although his employer might have had an action for breach of warranty against defendant when the allegedly defective safety device was installed, plaintiff had no cause of action until he was injured. Plaintiff's contention is supported by *Stell v. Firestone Tire & Rubber Company,* 306 F. Supp. 17 (W.D. N.C. 1969); *contra, Jarrell v. Samsonite Corp.* 12 N.C. App. 673, 184 S.E. 2d 376 (1971), *cert. denied,* 280 N.C. 180, 185 S.E. 2d 704 (1972); *State v. Aircraft Corp.,* 9 N.C. App. 557, 176 S.E. 2d 796 (1970). The last two cited cases followed the decision in *Hooper v. Lumber Company,* 215 N.C. 308, 1 S.E. 2d 818 (1939). For a critical analysis of that case, see: Lauerman, "The Accrual and Limitation of Causes of Actions for Nonapparent Bodily Harm and Physical Defects in Property in North Carolina," 8 Wake Forest Law Review 327, at 375 et seq. (1972).

We also do not consider whether G.S. 1-50(5) might be applicable to the present case. That statute makes a six year period of limitation applicable to an action for bodily injury "arising out of the defective and unsafe condition of an improvement to real property." The record now before us is not adequate to permit a determination whether the safety equip-

ment installed by defendant was, or was not, "an improvement to real property."

The judgment appealed from, which dismissed plaintiff's action, is reversed, and this cause is remanded to the trial court for further proceedings not inconsistent herewith.

Reversed and remanded.

Judges HEDRICK and ARNOLD concur.

MARY GOOD TILLEY v. JACK P. TILLEY

No. 7617DC221

(Filed 1 September 1976)

Divorce and Alimony § 23— child support — unilateral reduction in payment by defendant improper

Where a 1972 order of the court required defendant to provide for support of three minor children of the parties and provided for a reduction in support when the oldest of the three became 18, defendant had no authority to attempt unilaterally to reduce the amount of the payments when the second oldest child became 18; rather, the proper procedure for the defendant to have followed when the second child reached majority would have been for the defendant to have applied to the trial court for relief. G.S. 50-13.7.

APPEAL by defendant from *Clark, Judge.* Judgment entered 31 December 1975 in District Court, SURRY County. Heard in the Court of Appeals 10 June 1976.

This is a civil action wherein the plaintiff, Mary Good Tilley, has filed a motion in the cause in a divorce proceeding against the defendant, Jack P. Tilley, seeking delinquent support payments and an increase in support for Sandra Tilley, the minor child of the parties, and attorney's fees.

The plaintiff and defendant were married on 28 December 1951 and divorced on 1 December 1969. There were four children born to the marriage—Stephen, Lynn and Bradley, now more than eighteen years of age, and Sandra, sixteen years of age. At the time the divorce was granted, the court also entered a consent order providing for the support of the chil-

dren. This order was modified on 8 August 1972 when Judge Harris entered an order:

> "(1) That the defendant pay into the Office of the Clerk of Superior Court the sum of $250.00 per month for the support of Lynn Tilley, Bradley Tilley and Sandra Tilley until the month of November, at which time he is then and thereafter to pay into the Office of the Clerk of Superior Court the sum of $200.00 per month for the support of Bradley Tilley and Sandra Tilley; (2) That the defendant pay all medical and dental bills for his minor children under eighteen (18) years of age; (3) That he catch up arrearages and keep his payments current."

On 9 December 1975 plaintiff filed this motion in the cause seeking delinquent support payments and an increase in support to $250.00 per month. There was a hearing on 31 December 1975 in which both parties offered evidence. At the conclusion of the hearing the court made the following pertinent findings of fact:

> "7. A motion in the cause by the plaintiff was heard by Judge George M. Harris on August 8, 1972, and a judgment was signed by Judge Harris ordering the defendant to pay arrearages in support payments, to pay the medical and dental expenses of his minor children, to make support payments in the amount of $250 per month until November, 1972, to make payments of $200 per month for the support of his minor childlren, Bradley and Sandra, thereafter.
>
> 8. The defendant did not keep his payments to the Clerk's office up to date and, beginning with the month of November, 1974, at which time Bradley Tilley became eighteen years of age, the defendant reduced the payments without the consent of the plantiff and without the authority of the Court to $100 per month and is at this time $2,050.00 in arrears; the defendant also failed to pay $343.00 in dental bills for services rendered to Lynn, Bradley and Sandra Tilley during the years 1971 to 1975 when each of them was still a minor.
>
> 9. The minor child of the defendant, Sandra Tilley, is in the custody of the plaintiff and lives with her; and, having due regard to the estates, earnings, conditions and accustomed standard of living of the parties and of the minor child and taking into account the present economic

trend of increasing prices for consumer products, and reasonable needs of Sandra Tilley per month are as follows: food, $75; housing (her share of shelter, utilities, furnishings, appliances), $75; clothing, $30; transportation (her share of operation and maintenance of the family automobile) $35; other (education, recreation, gifts, etc.), $45.

10. The defendant is employed as a teacher at Enka High School in Buncombe County, North Carolina, and received take home pay of $806.36 per month for ten months and possesses the means to pay $200 per month support and the medical and dental expenses of his minor child.

11. The plaintiff is employed as a teacher in Surry County, North Carolina, and has the means to pay the expenses of bringing this action."

Based on these findings, the court entered an order that defendant pay $2,393.00 in delinquent support payments and unpaid dental bills. He also ordered that defendant continue to make support payments in the amount of $200.00 per month for the support of Sandra Tilley until she reaches eighteen on 26 January 1977. Defendant appealed.

Cama C. Merritt for plaintiff appellee.

William G. Reid for defendant appellant.

HEDRICK, Judge.

The only exceptions in the record are to the judgment and to the court's denial of the defendant's motion to set aside the judgment appealed from. These exceptions present the question of whether the facts found or admitted support the judgment and whether the judgment is in proper form.

Defendant contends the court erred in ordering him to pay $2,050.00 arrearages representing $100.00 per month from the date his son Bradley became 18 years old and that defendant was authorized to reduce the payments unilaterally by $100.00 per month when Bradley reached his majority.

"While a parent is under a legal as well as a moral obligation to support his minor children, that obligation normally terminates when the child reaches his majority and ceases to be dependent." *Ford v. National Bank,* 249 N.C. 141, 143, 105 S.E. 2d 421, 423 (1958).

In the present case the court concluded that "the defendant . . . [was] in arrears in support payments in the amount of $2,050.00." In the 8 August 1972 order, the court provided for a reduction in support when Lynn Tilley became 18 years of age. Had it desired to also provide for a reduction when Bradley became 18, it could easily have done so. The only logical interpretation of the August, 1972, order is that defendant was to continue to make support payments at $200.00 per month until there were no longer any minor children or until he made a showing of a change in circumstances justifying a modification of the order. *See Rabon v. Ledbetter,* 9 N.C. App. 376, 176 S.E. 2d 372 (1970). The August, 1972, order was incorporated into the findings of fact in the order appealed from. It supports the conclusion that defendant was in arrears $2,050.00. This argument is without merit.

Citing *Jarrell v. Jarrell,* 241 N.C. 73, 84 S.E. 2d 328 (1954), defendant argues in the alternative that even if the August, 1972, order did not provide for a reduction in support when Bradley became 18, the fact of Bradley's reaching the age of majority was such a change in circumstances as would justify a reduction in the amount of support. Defendant argues that the court should have modified the August, 1972, order and retroactively reduced the amount of support he was required to pay to only $100.00 per month from the date Bradley became 18.

The case cited by defendant is clearly distinguishable on its facts. Whether the trial court has the authority to retroactively reduce payments provided for child support by a prior order of the court, 2 Lee, North Carolina Family Law, § 153, pp. 232-33, is not before us, since the court in the instant case made no retroactive change in the 1972 order. As pointed out above, the facts found by the trial judge clearly support the order entered. The proper procedure for the defendant to have followed when Bradley reached majority would have been for the defendant to have applied to the trial court for relief. G.S. 50-13.7. We hold the defendant had no authority to unilaterally attempt his own modification of the 1972 order.

We note that plaintiff in her motion in the cause sought counsel fees. In the order appealed from by the defendant, the court found as a fact that plaintiff had the means "of bringing this action" and did not enter an order for counsel fees. Plaintiff did not appeal, but in her brief, citing G.S. 50-13.6, plaintiff

prays that this court order defendant to pay attorney's fees incurred by counsel in representing plaintiff on appeal. General Statute 50-13.6 authorizes the trial court, in a proper case, after making appropriate findings of fact, to order the payment of reasonable counsel fees. Neither the statute cited by plaintiff nor any other statute of which we are aware authorizes this court to make an award of attorney's fees. The judgment appealed from is

Affirmed.

Judges BRITT and MARTIN concur.

IN THE MATTER OF: INVESTIGATION BY THE ATTORNEY GENERAL OF NORTH CAROLINA INTO THE CORPORATE AFFAIRS OF SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY AND INTERROGATORIES PROPOUNDED IN CONJUNCTION THEREWITH PURSUANT TO SECTION 75-9 ET SEQ. OF THE GENERAL STATUTES OF NORTH CAROLINA

No. 7610SC211

(Filed 1 September 1976)

Attorney General; Privacy— investigation by Attorney General — protective order by superior court — right of privacy

The superior court had inherent authority to enter a protective order prohibiting public disclosure of information submitted by a telephone company to the Attorney General in a G.S. Chapter 75 investigation concerning the possible misuse of corporate funds by the telephone company where the pre-prosecution publicity of the information might unfairly implicate employees so as to violate their right to personal privacy.

Judge MARTIN dissents.

APPEAL by Respondent (Attorney General of North Carolina) from Order of *Bailey, Judge,* entered 9 January 1976, Superior Court, WAKE County. Heard in the Court of Appeals 9 June 1976.

This proceeding began on 9 January 1976, with the motion of petitioner Southern Bell Telephone and Telegraph Company (hereinafter referred to as "Southern Bell") for a protective order prohibiting public disclosure of information which South-

ern Bell proposed to submit to the Attorney General in response to Interrogatories propounded in the investigation by the Attorney General of allegations concerning the possible use by Southern Bell of corporate funds for other than a corporate purpose.

Soon after allegations of misuse of corporate funds were made, Southern Bell began its own investigation, which included an internal audit. A report of this internal audit was dated March 1975, and labeled "Southern Bell Audit Summary."

On 24 March 1975 Southern Bell delivered to the Attorney General answers to Interrogatories provided in February 1975, and a full report of Southern Bell's own investigation, including a copy of the Audit Summary.

On 12 November 1975, Southern Bell received extensive interrogatories from the Attorney General along with the statement that it was the purpose of the investigation to determine if state laws had been violated.

Though averring full cooperation with the investigation, Southern Bell alleged that the materials furnished and prepared to be furnished to the Attorney General contained information of *possible* misuse of funds, based almost entirely on hearsay evidence and evidence inadmissible in judicial proceedings, and that this information if released would invade the rights of privacy of and unjustifiably impose irreparable harm upon innocent persons.

After due notice and hearing Judge Bailey found facts substantially as set out above, and further found from *in camera* examination of the information sought to be so protected that the information required the protection sought, and in pertinent part ordered:

> "3. Neither the internal audit summary, nor the information contained in the response being provided by Southern Bell to the Interrogatories of the Attorney General propounded on November 10, 1975, nor any information subsequently obtained during the Attorney General's ongoing investigation which is a result of or derives from the information furnished in said response shall be disseminated or disclosed to the public, including the press, by any attorney connected with this investigation either as defense, prosecutor or any other attorney, judicial officers and em-

ployees, or by public officials, their assistants, deputies, employees or agents."

From this order respondent Attorney General appealed.

Attorney General Edmisten by Senior Deputy Attorney General Andrew A. Vanore, Jr., and Special Deputy Attorney General John M. Silverstein for the State, respondent appellant.

Joyner & Howison by R. C. Howison, Jr.; Moore & Van Allen by James O. Moore; and John F. Beasley for Southern Bell Telephone and Telegraph Company, petitioner appellee.

CLARK, Judge.

G.S. 75-9 grants the power to and imposes the duty upon the Attorney General of North Carolina to investigate "the affairs of all corporations or persons doing business in this State which are . . . doing business in violation of law," and further grants authority to procure "such information as may be necessary to enable him to prosecute any such corporation, its agents, officers and employees for crime, or prosecute civil actions against them if he discovers they are liable and should be prosecuted."

The Attorney General questions the authority of the Superior Court to enter a protective order in a Chapter 75 investigation. Chapter 75 grants the courts the authority to supervise investigations and to issue orders compelling attendance of witnesses (G.S. 75-9 and 75-10) and to fix the time and place for an examination or inspection where objection is made to the time and place designated by the Attorney General (G.S. 75-12).

Chapter 75 grants no specific authority to the judiciary for the issuance of a protective order. Although G.S. 75-9 empowers the Attorney General to prosecute under applicable criminal and civil statutes, the power to investigate under Chapter 75 is not subject to the restrictions imposed upon criminal discovery under the Criminal Procedure Act, G.S. 15A-908 or upon civil discovery under the Rules of Civil Procedure, G.S. 1A-1, Rule 26(c). These provisions empower the courts to control discovery by issuing protective orders, upon a showing of good cause, after criminal or civil proceedings have been initiated. The power of the court to protect parties under these provisions once proceedings have been initiated would be empty and futile if the court did not have similar power to protect parties during

the investigatory stage of proceedings before any charges have been brought. Moreover the potential for harm and embarrassment to innocent parties is highest at those early stages of investigation, when the evidence may be insubstantial and incompetent, yet very damaging, and when disclosure is not subject to the safeguards imposed in judicial proceedings.

If the courts are to properly exercise the powers and duties imposed by Chapter 75, and are to avoid the evisceration of their powers over civil and criminal discovery, we must, in the absence of legislative authority, look to our inherent powers which we find to be reasonably necessary in the proper administration of justice. See Mallard, "Inherent Power of the Courts of North Carolina," 10 Wake Forest Intramural L. Rev. 1 (1974); *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600 (1966); and *Utah Fuel Co. v. National B. Coal Comm.,* 306 U.S. 56, 59 S.Ct. 409, 83 L.Ed. 483 (1939).

Southern Bell in its Motion for Protective Order alleges that public disclosure of the information requested by the Attorney General and voluntarily submitted by Southern Bell would violate the right of privacy of some employees in that the information of possible misuse of corporate funds was based on hearsay and other evidence inadmissible in a judicial proceeding. We must rely on the finding of Judge Bailey from an *in camera* examination of the requested material that protection against release or disclosure was required. We assume from this finding that pre-prosecution publicity of the material requested and furnished would unfairly accuse or implicate employees so as to violate their fundamental right to personal privacy.

The personal right of privacy is basic to the moral and philosophic fiber of our democracy which places so much value upon the dignity of its citizenry. The right has been recognized in North Carolina. See *Flake v. News Co.,* 212 N.C. 780, 195 S.E. 55 (1938); *Barr v. Telephone Co.,* 13 N.C. App. 388, 185 S.E. 2d 714 (1972).

The balancing between society's need for information and the personal rights of the individual does not require that we stand by and allow basic personal rights, among them the right of privacy, to be debilitated by unrestrained and coercive government investigations. The need for government to deal effectively with lawlessness does not require the pre-proescution release of investigative information which hardly exceeds mere

rumor in standards of reliability and credibility. See 1 Davis, Administrative Law Treatise, § 3.13 (1958).

The Attorney General contends that Southern Bell must make a substantial showing of necessity before a protective order should issue, and that no such showing was made because there is no allegation or proof that the Attorney General made available or desired to make available the materials requested. However, such necessity relates to showing the potential harm which would result from disclosure rather than showing that the adverse party threatens or is inclined to make disclosure. See 4 Moore's Federal Practice, § 26.68 (1975).

In the case before us there is nothing to indicate that the Attorney General has in any way abused his authority in making his investigation under Chapter 75 or in attempting to publicize before prosecution any evidence of unlawful activity. The granting of the protective order herein does not rest upon a showing of any misconduct or probable misconduct by him. The Attorney General is not only the State's chief law enforcement officer but a steward of our liberties. This protective order should aid him in this stewardship. Even in the absence of legislative authority, orders by the courts to protect the personal right of privacy should be as useful to him in obtaining evidence of unlawful conduct in Chapter 75 investigations as is the immunity granted informants under G.S. 75-11.

The order is

Affirmed.

Judge VAUGHN concurs.

Judge MARTIN dissents.

EXECUTIVE LEASING ASSOCIATES, INC. v. BILL I. ROWLAND AND SYLVIA ROWLAND, INDIVIDUALLY AND t/a CAPITAL SAND & GRAVEL COMPANY, AND ROWLAND TRUCKING AND GRADING COMPANY

No. 7610SC7

(Filed 1 September 1976)

1. **Contracts § 2— acceptance — methods of expressing**

An acceptance is an essential element of a contract because it manifests the offeree's intent to be bound by the terms of the offer, and acceptance, unless otherwise specified, may be communicated by any means sufficient to manifest intent, including by signature, silence or conduct.

2. **Contracts § 27— offers to lease heavy equipment — acceptance of offers — sufficiency of evidence**

In an action to recover money and the possession of heavy equipment leased to defendants by plaintiff, the trial court erred in concluding as a matter of law that defendants' written offers to lease equipment had never been accepted by plaintiff, as plaintiff had never signed the forms, and therefore plaintiff could not recover under the written lease forms, since the evidence before the trial court presented two methods of acceptance sufficient to withstand defendant's summary judgment motion: (1) the copies of the lease forms attached to the complaint showed an entry of date of approval, which could constitute an acceptance by signature, and (2) the conduct of plaintiff in delivering to defendants the equipment which was the subject of the leases and in permitting defendants to use the same over an extended period of time could constitute acceptance of the lease offers.

APPEAL by plaintiff from *Smith, Judge.* Order entered 24 September 1975, Superior Court, WAKE County. Heard in the Court of Appeals 13 April 1976.

Plaintiff, a North Carolina corporation engaged in the business of leasing heavy equipment, alleged that on eight occasions between 27 February 1973 and 22 March 1974 defendants executed and delivered to plaintiff lease agreements for various items of equipment; that defendants had defaulted in payment of rent; that plaintiff was entitled to possession of the equipment and to the principal sum of $182,618.19, attorney's fees of $27,392.73, and costs of $18,100.00.

Defendants admitted that they had offered to lease the equipment, but contended that the lease forms required written acceptance by the plaintiff, and that as the unsigned copies attached to plaintiff's complaint showed, there had been no

acceptance. In their answer defendants also revoked the eight offers to lease and delivered constructive possession of all equipment to plaintiff's attorney.

Plaintiff then filed several requests for admission, attaching copies of the lease agreements which defendants had signed. Plaintiff had not signed the copies, but there were entries beside the words "Date Approved." Defendants admitted the delivery and execution of the lease forms supplied by plaintiff and the genuineness of the defendants' signatures thereon, but denied that such forms constituted agreements because plaintiff had not signified acceptance.

Plaintiff then moved for summary judgment under G.S. 1A-1, Rule 56. Plaintiff stated that the original copies of the agreements had been signed by a duly authorized agent of plaintiff, and that the originals would be introduced at the hearing upon the motion.

Defendants' response alleged upon information and belief that the signatures were not affixed until after the filing of plaintiff's answer, and therefore were without legal effect. At the same time, defendants filed a motion for judgment on the pleadings under G.S. 1A-1, Rule 12(c) upon the grounds that plaintiff's evidence failed to establish the existence of an agreement between plaintiff and defendants; to-wit, that the signature of an authorized agent of plaintiff was the only valid method to accept defendants' offers, and that defendants had revoked the offers before any such acceptance. Defendant Bill Rowland submitted an affidavit in support of the motion, and pursuant to G.S. 1A-1, Rule 12(c), the court treated the motion as one for summary judgment under G.S. 1A-1, Rule 56(c). The trial court concluded as a matter of law that defendants' written offers to lease equipment had never been accepted by plaintiff and therefore plaintiff could not recover under the written lease forms.

Plaintiff appeals from the summary judgment.

Hatch, Little, Bunn, Jones, Few & Berry by John N. McClain, Jr., for plaintiff appellant.

Purrington, Hatch & Purrington by Ashmead P. Pipkin for defendant appellees.

CLARK, Judge.

The issue presented upon appeal is whether the trial court erred in granting defendants' motion for summary judgment.

G.S. 1A-1, Rule 56 provides for a summary judgment if there is no genuine issue as to any material fact and if any party is entitled to judgment as a matter of law.

Summary judgment is a drastic remedy, and its requirements must be carefully observed in order that no person be deprived of a trial on a genuinely disputed issue. The party moving for a summary judgment has the burden of establishing the lack of a triable issue of material fact by the record properly before the court. This is so irrespective of the burden of proof at trial upon the issues raised in the pleadings. The movant's papers are carefully scrutinized while those of the opposing party are indulgently regarded. *Koontz v. City of Winston-Salem,* 280 N.C. 513, 186 S.E. 2d 897 (1972); *Miller v. Snipes,* 12 N.C. App. 342, 183 S.E. 2d 270 (1971), *cert. denied* 279 N.C. 619, 184 S.E. 2d 883 (1971).

[1] The trial court held as a matter of law that there was no contract between the parties because there had been no acceptance of defendants' offer. An acceptance is an essential element of a contract because it manifests the offeree's intent to be bound by the terms of the offer. Intention is the key element. A written signature is not the exclusive means of signifying acceptance. Acceptance, unless otherwise specified, may be communicated by any means sufficient to manifest intent. This may include a signature, silence, or conduct. *Foundation, Inc. v. Basnight,* 4 N.C. App. 652, 167 S.E. 2d 486 (1969).

The burden on the party moving for summary judgment may be carried by proving that an essential element of the opposing party's claim is non-existent. *Zimmerman v. Hogg & Allen,* 286 N.C. 24, 209 S.E. 2d 795 (1974). Defendants here have contended that there was no acceptance of their offers as a matter of law. This contention cannot be sustained for two reasons.

[2] The evidence before the trial court presented two modes of acceptance sufficient to deny defendants' motion. First, the copies of the lease forms attached to the complaint and to plaintiff's request for admissions show an entry of date of approval, which may constitute an acceptance by signature. Defendants

point out that there was no evidence that plaintiff made the entry, but at the least, this raises a genuine issue of material fact.

Second, it is clear from the record that on the date of their answer and at times prior thereto, defendants were in possession of the equipment referred to in the eight lease offers. The conduct of the plaintiff in delivering to defendants the equipment which was the subject of the leases and in permitting defendants to use the same over an extended period may constitute acceptance of the lease offers. Acceptance by conduct is a well-recognized principle in North Carolina law. *Durant v. Powell,* 215 N.C. 628, 2 S.E. 2d 884 (1939); *May v. Menzies,* 184 N.C. 150, 113 S.E. 593 (1922). See also *Performance Motors, Inc. v. Allen,* 280 N.C. 385, 186 S.E. 2d 161 (1972). While such conduct may not amount to an acceptance as a matter of law, it is certainly sufficent to make improvident any ruling that there has been no acceptance as a matter of law.

A third possible mode of acceptance is by signature of plaintiff or an authorized agent of plaintiff. The record upon appeal is unclear as to whether any genuine issue exists with respect to signatures on the original copies of the lease forms. Plaintiff may be able to clarify this issue upon remand. At any rate, such a finding is not essential to our disposition of the case.

We hold that summary judgment was improvidently granted.

The judgment is reversed.

Chief Judge BROCK and Judge HEDRICK concur.

IN THE MATTER OF THE WILL OF JAMES B. WADSWORTH, SR.,
CAVEAT

No. 766SC287

(Filed 1 September 1976)

1. Wills § 22— mental capacity before and after execution of will — opinion testimony

Witnesses in a caveat proceeding were properly permitted to give their opinions regarding the mental condition of testator when they

observed him within a reasonable time before and after the execution of his purported will.

2. **Evidence § 11; Wills § 22— dead man's statute — interested witness — statement by decedent**

In a caveat proceeding in which the issues being tried were undue influence and mental capacity, the trial court properly instructed the jury to disregard testimony by a beneficiary under the purported will that "He [testator] said it [the will] was just what he wanted," since the witness was interested within the meaning of G.S. 8-51 and the statement was not given as a basis for the witness's opinion on mental capacity but was only directed toward proving facts essential to propounder's case.

3. **Trial § 35— failure to define "greater weight of evidence"**

Where the court correctly placed the burden of proof and stated the proper degree of proof, the court was not required to define the term "greater weight of the evidence" in the absence of a special request.

APPEAL by propounder from *Cowper, Judge.* Judgment entered 21 November 1975 in Superior Court, BERTIE County. Heard in the Court of Appeals 25 August 1976.

The jury found that, at the time of the execution of the paper writing purporting to be the last will and testament of James B. Wadsworth, Sr., the testator lacked sufficient mental capacity to execute a will. The will was purportedly executed on 14 May 1974. Testator died on 9 November 1974.

Caveators offered evidence tending to show the following: Testator was about 82 years old when he died. He had suffered a series of strokes over a five-year period before his death. For several months immediately preceding his death testator did not have the mental capacity to know the nature and extent of the property he owned. Testator did not know the natural objects of his bounty or understand the consequences of the disposition of his property by will.

The propounder offered evidence tending to show that testator had sufficient mental capacity to know the nature and extent of his property, the natural objects of his bounty and the legal consequences of his will.

Pritchett, Cooke & Burch, by W. W. Pritchett, Jr., for propounder appellant.

Howard P. Satisky, for caveator appellee.

VAUGHN, Judge.

[1] Propounder's first assignment of error is that "Propounder excepts to the questions asked the Caveator's witnesses because the questions were not limited to the testator's mental condition at the approximate time he executed his will."

On the issue of testamentary capacity, it is proper to show the mental condition of the maker at a reasonable time before and after the execution of the purported will. *In Re Will of McDowell,* 230 N.C. 259, 52 S.E. 2d 807. Witnesses observed testator within a reasonable time before and after the execution of the will. For the most part they did not attempt to give an opinion of his condition on the date of the execution of the will. It was perfectly proper for them to give their opinion as of the time they observed the deceased. Indeed, testimony of one who does not qualify as an expert should be limited to the witness's opinion of the testator's condition as of the time the witness had the opportunity to observe the testator. *In Re Will of Rose,* 28 N.C. App. 38, 220 S.E. 2d 425. It is then for the jury to determine whether that evidence supports the inference that the testator was incompetent at the time of the purported execution of the will. We have considered all of defendant's exceptions brought forward under the first and fifth assignments of error and find no prejudicial error. Under the charge of the court, the jury could only have understood that they must make their determination of mental capacity as of the time of the purported execution of the will and not as of some other time. When the witnesses gave their opinion on the testator's mental capacity in 1974, the jury could have only understood that they meant during the times they observed testator in 1974.

[2] Propounder's second assignment of error arises out of the following: One of the beneficiaries under the will was testifying on direct examination. The witness blurted out, "He [testator] said it [the will] was just what he wanted." The statement was not in response to any question put to her. The judge instructed the jury not to consider the statement and propounder takes exceptions to the ruling. The trial judge was correct. The issues being tried were undue influence and mental capacity. The witness was interested within the meaning of G.S. 8-51. The statement was not given as a basis for the witness's opinion on mental capacity. It was only directed toward

proving facts essential to propounder's case. It was properly excluded. *Whitley v. Redden,* 276 N.C. 263, 171 S.E. 2d 894.

[3] Propounder excepts to the failure of the court "to define for the jury the term 'greater weight of the evidence.' " The instruction was not properly requested at trial. Where, as here, the court correctly places the burden of proof and states the proper degree of weight, the court is not required to define the term "greater weigh of the evidence" in the absence of a special request. *Hardee v. York,* 262 N.C. 237, 136 S.E. 2d 582.

Finally, propounder contends the court should have allowed his motion to set the verdict side as being contrary to the greater weight of the evidence. The motion was addressed to the sound discretion of the trial judge on his ruling and will not be disturbed in the absence of a manifest abuse of discretion. No abuse of discretion has been shown.

We have carefully considered all of the exceptions brought forward on appeal. We conclude that the trial was free from error so prejudicial as to have influenced the verdict of the jury.

No error.

Judges MORRIS and CLARK concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 AUGUST 1976

AUTOMOBILE RATE OFFICE v. INGRAM No. 7510SC948	Wake (75CVS4360)	Vacated
COMR. OF INSURANCE v. AUTOMOBILE RATE OFFICE No. 7510INS980	Comr. of Ins.	Auto Liability—Reversed and Remanded Collision Ins.—Order is Nullity and is Vacated
COMR. OF INSURANCE v. MOTORS INS. ET AL No. 7510INS983	Comr. of Ins.	Reversed and Remanded

HUMES v. HUMES No. 7621DC101	Forsyth (75CVD2154)	Affirmed
IN RE CUSTODY OF CLARK No. 7613DC48	Bladen (75CVDO193)	Affirmed
MENDENHALL v. MENDENHALL No. 7621DC153	Forsyth (75CVD2427)	No Error
O'KELLEY v. BURRELL No. 7628SC52	Buncombe (71CVS1687)	Order—9 April 1974 Affirmed Judgment—23 July 1975 Vacated and Remanded
STATE v. BOLES No. 763SC72	Craven (75CR2996)	No Error
STATE v. RIGGSBEE No. 7610SC130	Wake (75CR57749) (75CR57750)	No Error
TELEPHONE CO. v. SHOAF No. 7622DC196	Davidson (74CVD500)	Simmerson and Wife—New Trial Remaining Defendants—Affirmed

FILED 1 SEPTEMBER 1976

STATE v. CALDWELL No. 7620SC292	Moore (74CR5662) (74CR5661)	No Error
STATE v. ELAM No. 769SC216	Franklin (74CR4564)	No Error
STATE v. NANCE No. 7626SC107	Mecklenburg (75CR20788)	No Error
WILLIAMS v. WILLIAMS No. 763DC94	Craven (74CVD1658)	Affirmed

EAST COAST DEVELOPMENT CORP. v. ALDERMAN-250 CORPORATION

No. 7615SC61

(Filed 15 September 1976)

1. **Contracts § 17— indefinite duration — unilateral termination**

A contract of indefinite duration may be unilaterally terminated by either party on giving reasonable notice after the contract has been in effect for a reasonable time, taking into account the purpose the parties intended to accomplish.

2. **Contracts § 17— termination of contract — reasonable time — question of fact**

Whether a contract had been in effect for a reasonable time was a question of fact to be determined by the court in a nonjury trial where different inferences could have been drawn from the evidence.

3. **Contracts § 17— duration of contract — reasonable time**

The evidence supported the trial court's finding that a contract for the marketing of certain commercial properties had not been in effect for a reasonable period of time when defendant attempted to terminate the contract some four years and three months after it was entered.

4. **Contracts § 12— construction of contract — cost basis of property**

Where a contract provided that defendant would first recover its cost basis from the proceeds of a sale of land and that any proceeds over and above said cost basis would be divided equally between plaintiff and defendant, and the contract specified the cost basis as a certain amount, defendant was not entitled to add to its cost basis interest and taxes expended to carry the property from the time the contract was entered until the property was sold.

5. **Damages § 11— punitive damages**

Punitive damages may be awarded when an act is done with wilfulness or under circumstances of rudeness, oppression, or reckless and wanton disregard of the plaintiff's rights.

6. **Damages § 11; Contracts § 29— punitive damages — insufficient findings**

The trial court's finding that defendant's conditional tender to plaintiff of only a portion of the sum due under the terms of a contract constituted a conversion of the sum due was insufficient to support an award of punitive damages to plaintiff.

7. **Contracts § 27— sufficiency of evidence to support findings — cost basis of property**

The evidence supported the trial court's finding that plaintiff and defendant mutually agreed to an extension of water and sewer lines to property which was the subject of a contract between them, and the court properly concluded that defendant was entitled under the

contract to add the development costs of the water and sewer lines to its cost basis in the property in determining the profits to be divided between plaintiff and defendant upon a sale of the property.

8. **Contracts § 29; Appeal and Error § 52— breach of contract — damages — incorrect award by court — invited error**

In an action for breach of contract to market and sell certain property and divide the proceeds exceeding defendant's cost basis in the property, the trial court's award of damages to plaintiff based upon a determination of the fair market value of the property on the date defendant repudiated its agreement with plaintiff, rather than upon the amount for which the property could have been sold in the exercise of reasonable care and judgment, constituted invited error where the damages awarded were those requested by plaintiff in its complaint, no evidence of the amount for which the property could have been sold was presented at the trial, and plaintiff failed to object at trial to the measure of damages.

APPEAL by plaintiff and defendant from *Alvis, Judge.* Judgment entered 24 July 1975 in Superior Court, ORANGE County. Heard in the Court of Appeals 6 May 1976.

Plaintiff filed a complaint alleging that in 1965 Gus and Andrew Karres (the "Karres brothers") entered into a parol agreement with defendant whereby they transferred to defendant their interest in two pieces of real estate: the Crowell-Little property and the Roberson property (in which the Karres brothers had an undivided one-fourth interest); that the parol trust agreement was subsequently incorporated into a written contract dated 23 August 1968 between the plaintiff, as nominee for the Karres brothers, and defendant pursuant to which plaintiff and defendant were to market and sell four properties, including the Crowell-Little property and the Roberson property; that pursuant to the contract plaintiff procured a buyer for the Crowell-Little property and defendant sold the property to said buyer by deed dated 30 November 1972 for $300,000 whereupon plaintiff made demands for $74,655.88, one-half of the net sale proceeds, but defendant refused and offered plaintiff only $31,128.02 as full payment which plaintiff refused to accept; that defendant has since wilfully converted plaintiff's share of the profits to its own use with the result that plaintiff is entitled to punitive damages in the amount of $1,000,000; that defendant has also refused to cooperate in any way with plaintiff in efforts to market the Roberson property as required by the contract but has given written notice to plaintiff dated 29 September 1972 of its ex parte termination of the contract as of 30 November 1972; that by written notice dated 17 November

1972 plaintiff denied any right of defendant to terminate the contract and demanded that defendant honor its terms; that defendant has since negotiated a sale or transfer of the Roberson property to a joint venture in which defendant is a participant for the purpose of developing the property in derogation of plaintiff's right of first refusal under the contract; and that plaintiff has no adequate remedy at law for such derogation and is therefore entitled to specific performance of the contract as to the Roberson property or, in the alternative, damages based on a presumed sale of the Roberson property at the fair market value at the time of defendant's breach and division of the proceeds in accordance with the contract formula.

Defendant answered, admitting the existence of the contract but alleging that due to plaintiff's failure to procure any bona fide prospects for the sale of the property, with the exception of the Crowell-Little property which buyer had procured after the notice of termination was given, it effectively terminated the contract on 30 November 1972 and said termination bars any rights in plaintiff regarding the Roberson property. Defendant further alleges that plaintiff is entitled to only $31,128.02 as its share of the proceeds from the sale of the Crowell-Little property. Defendant filed the contract as an exhibit and it provides that defendant and plaintiff "contract and agree that they will jointly develop and/or market the real estate hereinabove . . . referred to to the end that [defendant] will receive its costs in said properties, after which the parties hereto will divide any profits made from the marketing and/or developing of said properties equally"; that the "cost basis" of the Crowell-Little property is $150,388.24 and the "minimum sale figure" is $300,000; that the "cost basis" of the Roberson property is $56,187.59 and the "minimum sale figure" is $300,000; (two other properties are listed in the contract but the trial court's findings and conclusions relating to them are not the subject of appeal by either party); that "any further development costs mutually agreed upon by the parties hereto which are expended on said property by [defendant] shall be added to [defendant's] cost basis and also will be added to the minimum sales figure . . . " ; that "upon the sale of the . . . properties . . . [defendant] will first recover its cost basis from the proceeds of each individual sale and any proceeds over and above said cost basis . . . shall be equally divided between [defendant] and [plaintiff] . . . " ; that "in the event either of the parties

obtains a prospective buyer for any of the properties . . . at or above the minimum sales price herein contained and desires to consummate a sale at said price, the other party to this agreement will have the option and right of first refusal . . . " ; and that defendant "will have the right to receive and retain the operating income of the properties during the time that it has ownership of same and further agrees to absorb any operating losses that occur from said property during said period of time." The contract provides no expiration date.

At trial, plaintiff presented evidence which tended to show that the consideration for the contract was the dismissal of certain litigation between the Karres brothers and defendant; that with regard to the Crowell-Little property plaintiff has never agreed orally or in writing to the addition of any development costs to defendant's cost basis; that plaintiff made substantial efforts to procure purchasers of the Crowell-Little property from 1968 to 1972 when it was finally sold; that plaintiff also made substantial efforts to sell the Roberson property, but was unable to firm it up because defendant refused to supply the necessary information regarding outstanding obligations on the property; that plaintiff did not disclose the prospective purchaser's name to defendant but did tell defendant it had a bona fide offer of $350,000 but defendant still refused to supply the necessary information; that two partnerships have been formed and contracts entered into by defendant with the objective of developing the Roberson property as opposed to selling it but plaintiff was never notified of or consulted in regard to such plans; and that development costs have been incurred for the Roberson property but they have never been approved by plaintiff. Plaintiff presented testimony of several real estate appraisers as to the fair market value of a one-fourth undivided interest in the Roberson property as of 30 November 1972; $480,000, $474,439, and $417,500.

Defendant presented evidence which tended to show that it expended a substantial amount in interest and taxes to carry the Crowell-Little property from 1968 until it was sold thereby creating a total cost basis for the property of $237,743.98 as opposed to the amount specified in the contract; that following the sale of the Crowell-Little property defendant offered plaintiff a check in the amount of $31,138.02 which check bore the legend, "Commission on sale of Crowell Little Property Per Agreement of 8/23/68," but plaintiff refused the check and the

funds were then co-mingled with other funds of defendant; that the check was offered to plaintiff "with no strings attached"; that in regard to the Roberson property, defendant has attempted to sell it since 1968 but the minority ownership always presented a stumbling block; that plaintiff expressly requested that utilities and water services be extended to the Roberson property in order to make it more saleable; that $46,497.51 was expended by defendant for sewer and water extension from Chapel Hill to the Roberson property line and additional taxes, engineering and survey fees were paid bringing the total cost basis of the Roberson property to $122,051.48; and that defendant did refuse to give information regarding certain property other than the Roberson property to plaintiff because plaintiff never identified its prospects so that defendant could run a credit check on them. Defendant presented the opinion of two appraisers as to the value of a one-fourth undivided interest in the Roberson property as of 30 November 1972; $281,500 and $250,000.

The trial court entered an order finding that the Crowell-Little property was sold for $300,000 and the parties had stipulated that selling expenses of $300 could be deducted from the gross proceeds; that subsequent to 30 November 1972 defendant, with the owners of the three-fourths interest in the Roberson property, conveyed it to two partnerships which have commenced development of the property; that as of 30 November 1972 a one-fourth undivided interest in the Roberson property had a fair market value of $250,000; that prior to 30 November 1972 plaintiff requested of defendant that water and sewer utilities be extended to the Roberson property and defendant thereupon expended $46,497.51 causing the cost basis of said property to be increased to $102,685.10 as opposed to the amount specified in the contract; and that a reasonable period in which to accomplish the objectives of the contract had not expired as of 30 November 1972 and therefore defendant's notice of termination was not reasonable. The court thereupon concluded that the cost basis of the Crowell-Little property is the amount specified in the contract and defendant is not entitled to augment it by taxes and interest paid to carry the property but may deduct its selling expense from the gross proceeds so that plaintiff is entitled to receive $74,655.88 of the net sale proceeds; that defendant's failure to unconditionally tender such amount to plaintiff constituted a wilful conversion of plaintiff's share of

the proceeds and as a result plaintiff is entitled to receive $5,968.00 as punitive damages; that defendant is entitled to augment its cost basis for the Roberson property by the amount expended for water and sewer services; and that defendant breached the contract by conveying the Roberson property to two partnerships and plaintiff is therefore entitled to damages equal to one-half the difference between the augmented cost basis and the lesser of (a) the fair market value or (b) the contract minimum sales price on the date of the breach, which formula entitles plaintiff to $73,657.45 (one-half fair market value — $250,000 minus augmented cost basis — $102,685.10). Both parties appeal.

Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson, by Josiah S. Murray III, for plaintiff.

Murdock, Jarvis, Johnson & LaBarre, by Jerry L. Jarvis, for defendant.

MARTIN, Judge.

DEFENDANT'S APPEAL

Defendant contends that since the contract of 23 August 1968 fixed no time for its duration it was subject to termination by either party upon the giving of reasonable notice, and that 60 days notice of termination after the expiration of 4 years and 3 months from the execution of the contract was reasonable.

[1] North Carolina follows the generally accepted view that a contract of indefinite duration may be terminated by either party on giving reasonable notice. See *Scarborough v. Adams*, 264 N.C. 631, 142 S.E. 2d 608 (1965); *Rubber Co. v. Distributors*, 253 N.C. 459, 117 S.E. 2d 479 (1960); *Fulghum v. Selma* and *Griffis v. Selma*, 238 N.C. 100, 76 S.E. 2d 368 (1953); *Superior Foods v. Super Markets*, 24 N.C. App. 447, 210 S.E. 2d 900 (1975), *aff'd.* 288 N.C. 213, 217 S.E. 2d 566 (1975); *City of Gastonia v. Power Company*, 19 N.C. App. 315, 199 S.E. 2d 27 (1973). To avoid injustice, however, this rule is subject to the qualification that such a contract may not be unilaterally terminated until it has been in effect for a reasonable time, taking into account the purposes the parties intended to accomplish. *Scarborough v. Adams, supra; City of Gastonia v. Power Co., supra; Atkinson v. Wilkerson*, 10 N.C. App. 643, 179 S.E. 2d 872 (1971).

The North Carolina position is set forth in 2 Strong, N. C. Index 2d, Contracts, § 17, p. 322, as follows:

> "As a general rule, where no time is fixed for the termination of a contract it will continue for a reasonable time, taking into account the purposes that the parties intended to accomplish; and where the duration of the contract cannot be implied from its nature and the circumstances surrounding its execution, the contract is terminable at will by either party on reasonable notice to the other."

[2, 3] The question of whether there was a "reasonable time" under the circumstances of the instant case on appeal was a question of fact under the test stated in *Hardee's v. Hicks,* 5 N.C. App. 595, 599, 169 S.E. 2d 70, 73 (1969). In that case, the Court said, " . . . if different inferences may be drawn, or circumstances are numerous and complicated, and such that a definite legal rule cannot be applied to them, then the matter [of what is a reasonable time] should be submitted to the jury. It is only when the facts are undisputed and different inferences cannot be reasonably drawn from them, that the question ever becomes one of law. (Citations omitted.)" In the case now before this Court, the trial judge, sitting without a jury and as trier of all facts, found as a fact that "[a] reasonable period of time in which to accomplish or to expect to accomplish the objectives of the contract and agreement of August 23, 1968, had not expired as of November 30, 1972 . . . " ; the trial judge further found as an ultimate finding of fact and conclusion of law " . . . that the aforesaid letter notice of intended termination was legally ineffective to terminate the subject contract and agreement of August 23, 1968, with reference to the Roberson property and Eastgate Shopping Center property and that a period of four years and three months was not a reasonable period, in view of the difficulty of marketing these particular properties, within which the parties to the subject contract and agreement of August 23, 1968 could reasonably expect to accomplish the goals and purposes of the contract."

The "difficulty of marketing these particular properties" was a circumstance which would allow for different inferences to be drawn. As to what was or was not a reasonable period of time, we agree that the finding by the trial court "that a reasonable period of time . . . had not expired . . . " is supported by the evidence.

[4] The defendant next contends the trial court erred in concluding as a matter of law that defendant was not entitled to augment its cost basis for the Crowell-Little property by either capitalization of interest expense or by increment adjustment for payment of ad valorem taxes. Defendant argues that the contract reasonably implies that defendant wou'd be able to recover from sale proceeds costs unavoidably incurred to maintain the property; otherwise, defendant's share of profits would be systematically diminished with the mere passage of time.

It is elementary that when a contract is plain and unambiguous the construction of the agreement is a matter of law for the court. See 2 Strong, N. C. Index 2d, Contracts, § 12, p. 311. This Court summarized the applicable law on this point as follows:

> "In the case of *Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 127 S.E. 2d 539, it is stated: 'When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of constructions, cannot reject what the parties inserted or insert what the parties elected to omit. (Citation omitted.) It is the province of the courts to contrue and not to make contracts for the parties. (Citations omitted.) The terms of an unambiguous contract are to be taken and understood in their plain, ordinary and popular sense. (Citation omitted.)' " *Peaseley v. Coke Co.*, 12 N.C. App. 226, 231, 182 S.E. 2d 810, 813 (1971).

In the instant case, the contract provides that " . . . Alderman will first recover its cost basis from the proceeds of each individual sale and any proceeds over and above sa'd cost basis on said individual sale shall be equally divided between Alderman and East Coast . . . . " In addition, paragraph 2 of the contract clearly delineates the cost basis of the Crowell-Little property as $150,388.24. The language of the contract is clear. The defendant cannot after the fact insert into the contract a provision for augmentation of cost basis when the express language of the contract does not so provide and the law does not imply such a provision. Defendant's second assignment of error is overruled.

By its third assignment of error defendant contends the plaintiff was not entitled to punitive damages by reason of

defendant's failure to pay money due plaintiff pursuant to the terms of their contract. The court found:

> "The failure of the Defendant to make an unconditional tender to the Plaintiff of a share of the net sale proceeds realized and received by the Defendant with respect to the sale of the Crowell-Little Real Estate Co. property, at least to the extent of thirty-one thousand one hundred twenty-eight and 02/100 dollars ($31,128.02) based upon facts admitted by the Defendant, and the failure of the Defendant to distribute and pay over to the Plaintiff the sum of seventy-four thousand six hundred fifty-five and 88/100 dollars ($74,655.88) based upon facts found by the Court, constituted a conversion by the Defendant of Plaintiff's share in the net sale proceeds realized and received by the Defendant with respect to the sale of the Crowell-Little Real Estate Co. property."

Defendant contends the plaintiff is not entitled to punitive damages for conversion because plaintiff failed to allege or to offer any evidence establishing on the part of defendant any malice, gross or wilful wrong, or conduct evincing a reckless disregard of plaintiff's rights and that while the court below concluded that defendant's conduct was of such nature, the court made no findings of fact to support such a conclusion. We agree.

[5] Punitive damages may be awarded when an act is done with wilfulness or under circumstances of rudeness, oppression, or reckless and wanton disregard of the plaintiff's rights. See *Clouse v. Motors Inc.*, 14 N.C. App. 117, 187 S.E. 2d 398 (1972). While it is not required that punitive damages be specially pleaded by that name in the complaint, it is necessary that the plaintiff allege " . . . facts or elements showing the aggravating circumstances which would justify the award of punitive damages, for instance, actual malice, or oppression, or gross and willful wrong or negligence, or a reckless and wanton disregard of plaintiff's rights. (Citations omitted.)" *Cook v. Lanier*, 267 N.C. 166, 172, 147 S.E. 2d 910, 915 (1966). Moreover, "[p]unitive or exemplary damages are never awarded on the ground that the plaintiff has a right thereto. (Citation omitted.) With the exception of a breach of promise to marry, punitive damages are not given for breach of contract. (Citations omitted.)" *King v. Insurance Co.*, 273 N.C. 396, 398, 159 S.E. 2d 891, 893 (1968).

In 25 C.J.S., Damages, § 120, p. 1126, it is said:

"As a general rule, in the absence of statutory authority, exemplary damages are not recoverable in actions for the breach of contracts, irrespective of the motive on the part of defendant which prompted the breach. . . . No more can be recovered as damages than will fully compensate the party injured . . . .

"Thus where the acts constituting a breach of contract also amount to a cause of action in tort, there may be a recovery of exemplary damages on proper allegations and proof. As sometimes stated, exemplary damages are recoverable for a tort committed in connection with, but independently of, the breach of contract, where the essentials of an award of such damages are otherwise present, the allowance of such damages being for the tort and not for the breach of contract. In order to permit a recovery, however, the breach must be attended by some intentional wrong, insult, abuse, or gross negligence which amounts to an independent tort."

[6] The only finding that has any bearing on this issue relates to the tender by the defendant of the sum it conceded to be due the plaintiff on 30 November 1972. From this finding, the trial court proceeded to conclude that since the tender was not unconditional the tender constituted a conversion of the sum due. This finding, considered in light of the evidence presented, was not sufficient to support the trial court's conclusion that the defendant's actions amounted to wilful and malicious conduct entitling plaintiff to punitive damages.

We agree with the court's findings that defendant was unable to justify its asserted claim to an augmented cost basis in the Crowell-Little property by reference to any contractual provision pertinent to the question and that tender of its check with the endorsed legend, if accepted under such conditions would amount to a full and complete discharge of the debt. However, this does not amount to evidence of insult, indignity, malice, oppression or bad motive. We do not think the law requires that punishment should be meted out in this action. Defendant's third assignment of error is sustained and that part of the judgment awarding plaintiff punitive damages is vacated.

PLAINTIFF'S APPEAL

[7] Plaintiff assigns as error the action of the court in allowing for augmentation of defendant's contract cost basis in and with respect to the Roberson property.

The contract provides: "It is understood by and between the parties hereto that any future development costs mutually agreed upon by the parties hereto which are expended on said property by Alderman shall be added to Alderman's cost basis and also will be added to the minimum sales figure set forth in paragraph 2."

The contract does not specify any particular form of agreement for expenditure of development costs, and it does not specify that the amount of such costs must be mutually agreed upon prior to the expenditure. The plaintiff does not contend that the expenses incurred by the defendant to bring water and sewer facilities to the site were not incurred, were unreasonable, or were unnecessary. The plaintiff does deny that it agreed to the extension of water and sewer utilities to the premises.

The trial court found as a fact that:

> "[p]rior to November 30, 1972, the defendant expended the sum of forty-six thousand four hundred ninety-seven and 51/100 dollars ($46,497.51) in development costs incident to the extension and installment of water and sewer facilities for the Roberson property . . . and . . . that Alderman-250 Corporation had a cost basis in the Roberson Property on November 30, 1972 in the amount of one hundred two thousand six hundred eighty-five and 10/100 dollars ($102,685.10)."

Based upon these findings of fact, the trial court made the ultimate findings of fact and conclusions of law to the effect that "Plaintiff mutually agreed with Defendant for Defendant to incur a development cost with respect to the Roberson property in the amount of forty-six thousand four hundred ninety-seven and 51/100 dollars ($46,497.51) for the extension of water and sewer service lines to the Roberson property," and that "Defendant is entitled to augment its contract cost basis for the Roberson property, such contract cost basis being fifty-six thousand one hundred eighty-seven and 59/100 dollars ($56,187.59) . . . by forty-six thousand four hundred

ninety-seven and 51/100 dollars ($46,497.51) the amount of the development cost mutually agreed to by the plaintiff and the defendant with respect to the Roberson property. . . ."

The principle that a trial court's findings of fact are conclusive if supported by any competent evidence and that a judgment supported by such findings must be affirmed even though there is evidence contra is well established. In *Vaughn v. Tyson*, 14 N.C. App. 548, 550, 188 S.E. 2d 614, 616 (1972), this Court stated that:

> "In a non-jury trial the findings by the court have the force and effect of a verdict of a jury and are conclusive on appeal if supported by any competent evidence notwithstanding that there is evidence contra which would sustain findings to the contrary. (Citations omitted.)"

The evidence submitted in the instant case is plenary to support the findings of fact and conclusion of law based thereon. This assignment of error is overruled.

Plaintiff next assigns as error the action of the court in finding as a fact and concluding as a matter of law that, as of November 30, 1972, a one-fourth undivided interest in the Roberson property had a fair market value of $250,000.

Upon careful review we think and so hold that there was competent evidence as to the fair market value of the Roberson property upon which the trial court could arrive at a value of $250,000.

"When a trial by jury is waived, and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial judge. (Citation omitted.)" *Repair Co. v. Morris & Associates*, 2 N.C. App. 72, 75, 162 S.E. 2d 611, 613 (1968). This assignment of error is overruled.

[8] Finally, plaintiff contends the measure of damages awarded with respect to the Roberson property was incorrect and should have been one-half (1/2) of the difference between defendant's contract cost basis and the greater of (a) the amount for which the property could have been sold in the exercise of reasonable care and judgment or (b) the contract minimum sales price, because plaintiff is entitled to be put in the same position as if the contract had been performed by defendant.

The formula adopted by the trial court is predicated upon a determination of the fair market value of the Roberson property as of the date defendant repudiated its agreement with the plaintiff, and this formula was disapproved and rejected in *Newby v. Realty Co.*, 180 N.C. 51, 103 S.E. 909 (1920); and in *Cook v. Lawson*, 3 N.C. App. 104, 164 S.E. 2d 29 (1968). The correct formulation of remedy for recovery of damages is bottomed upon the premise that the plaintiff is entitled to be put in the same position as it would have been if the contract had been performed, and to recover what has been lost by non-performance, rather than the difference between the option price or cost basis and the market value as of the time of repudiation. See *Newby v. Realty Co., supra,* and *Cook v. Lawson, supra.*

However, plaintiff concedes that in its complaint it prays for a presumed sale at the fair market value on the date of breach. The damages awarded were those requested by plaintiff in its complaint. No evidence of the amount for which the property could have been sold was presented at the trial and the plaintiff's failure to object to the measure of damages at trial constitutes invited error. See *Smith v. Simpson*, 260 N.C. 601, 133 S.E. 2d 474 (1963); *In Re Will of McGowan*, 235 N.C. 404, 70 S.E. 2d 189 (1952); *Johnson v. Sidbury*, 226 N.C. 345, 38 S.E. 2d 82 (1946). Plaintiff's assignment of error is overruled.

Defendant's Appeal—Affirmed in part and reversed in part.

Plaintiff's Appeal—Affirmed.

Judges BRITT and PARKER concur.

Stutts v. Swaim

HAROLD STUTTS AND WIFE, VIOLET S. STUTTS; GEORGE F. SNIDER AND WIFE, JOHNSIE D. SNIDER; JOSH W. WATERS AND WIFE, MYRA W. WATERS; GLENN H. JESSUP AND WIFE, ERNESTINE G. JESSUP; MRS. EULA McELHANNON; EVERETT NIXON AND WIFE, DORIS Y. NIXON; MISS VERA WISE; PAUL RICHARDSON AND WIFE, DOROTHY RICHARDSON; CARL W. SMITH AND WIFE, WILLIE BELLE SMITH; LONNIE F. BUTLER AND WIFE, MARY BUTLER v. THOMAS EUGENE SWAIM AND WIFE, MARKETIA BEANE SWAIM; THE CITY OF RANDLEMAN, A MUNICIPAL CORPORATION, AND PHIL PENDRY, SUPERINTENDENT OF BUILDING INSPECTIONS FOR THE CITY OF RANDLEMAN

No. 7519SC784

(Filed 15 September 1976)

1. **Municipal Corporations § 30— tract rezoned for mobile homes — spot zoning**

In an action to have defendant landowners enjoined from operating a mobile home park on their land and to have declared unconstitutional and void an ordinance adopted by defendant city which rezoned such land, evidence was sufficient to support the trial court's conclusion that the action of defendant city in adopting the ordinance constituted spot zoning and the city therefore exceeded its authority in adopting the ordinance where such evidence tended to show that while the classification for the approximately four acres of land owned by defendant landowners was changed by the challenged ordinance, the classification for approximately five hundred acres owned by plaintiffs and others was not changed, thereby relieving the small tract from restrictions to which the rest of the area was subjected.

2. **Municipal Corporations § 30; Equity § 2— rezoning ordinance — delay in challenging — no laches**

In an action instituted on 5 June 1974 to have defendant landowners enjoined from operating a mobile home park on their land and to have declared unconstitutional and void an ordinance adopted on 12 November 1968 by defendant city which rezoned defendant landowners' property from residential to mobile home, defendants failed to carry the burden of showing that the delay by plaintiffs in challenging the validity of the ordinance in question was unreasonable and that the delay worked to their disadvantage, injury or prejudice, since the evidence at trial disclosed no change in position by defendant landowners until June or July 1973; at that time they led plaintiffs to believe that they were not developing a mobile home park but were instead going to build a house; and very soon after plaintiffs learned of the real intentions of defendant landowners they instituted this action.

APPEAL by defendants from *Crissman, Judge.* Judgment entered 16 April 1975 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 22 January 1976.

In this action, instituted 5 June 1974, plaintiffs seek (1) to have defendants Swaim enjoined from operating a mobile home park on their land, and (2) to have declared unconstitutional and void an ordinance adopted by defendant city. Jury trial was waived.

Allegations of the complaint are summarized in pertinent part as follows:

On 9 May 1967, pursuant to authority given it by the General Assembly, defendant city adopted a zoning ordinance affecting all the area within its corporate limits and a one-mile perimeter area adjacent thereto. Plaintiffs are the owners of various parcels of real estate located on or near the Worthville Road and within the perimeter area. Defendants Swaim are the owners of approximately four acres of land which is also located in the perimeter area, adjacent to or near plaintiffs' lands. By said ordinance the lands owned by plaintiffs and defendants Swaim were classified R-1, Residential, permitting single family and two-family residences but specifically excluding travel trailers and mobile homes.

On 12 November 1968, defendant city, at the request of and pursuant to fraudulent representations by defendant T. E. Swaim, passed an ordinance purporting to rezone the Swaim property from R-1, Residential, to M-H, Mobile Home. Defendant city failed to give proper notice prior to adopting said ordinance, and failed to follow required procedures at the time of, and subsequent to, its adoption.

Defendants Swaim are in the process of developing their property as a mobile home park and are about to apply to defendant Pendry for building permits to enable them to locate numerous mobile homes on their property. If defendants Swaim are permitted to develop their property as a mobile home park, the value of plaintiffs' property will be substantially reduced and they will suffer irreparable damage.

Plaintiffs asked that the 12 November 1968 ordinance be declared unconstitutional and void and that they be granted temporary and permanent injunctive relief.

In their answer, defendants Swaim admitted that they were in the process of developing their property as a mobile home park but denied that the challenged ordinance is invalid.

Defendants further pleaded the three-years statute of limitations and laches on the part of plaintiffs.

Following a trial during which the court, by stipulation of the parties, visited and viewed the lands of plaintiffs and defendants Swaim, the court entered judgment which is summarized in pertinent part as follows:

FINDINGS OF FACT

On 9 May 1967, defendant city adopted a comprehensive zoning ordinance applicable to the lands in question and under the ordinance the land of defendants Swaim was zoned R-1, Residential. On 12 November 1968, defendant city adopted an ordinance changing the classification of defendants Swaim's land from R-1, Residential, to M-H, Mobile Home. The zoned area outside the city limits has two mobile home parks located therein, one at Worthville and one on Highway 311; these mobile home parks are located approximately three miles apart and the property in question is located approximately three-fourths of a mile from Worthville and approximately two and one-half miles from the other mobile home park.

The entire perimeter area in question is occupied for the most part by "single standing" residential dwellings, mostly of brick construction, with attractive surroundings and spacious yards with well kept open spaces between the homes. The only areas in the perimeter originally zoned for mobile homes are the areas on which the two mobile home parks aforesaid are located. Plaintiffs were not aware of the change brought about in the zoning ordinance adopted 12 November 1968 until sometime during the month of March of 1974, although notice of public hearing as required by law was published in an area newspaper.

CONCLUSIONS OF LAW

The action of defendant city in passing the ordinance of 12 November 1968 was arbitrary and capricious, and was "not enacted in relation to the health, welfare and master comprehensive plan" enacted by defendant city by its ordinance of 9 May 1967.

The ordinance passed by defendant city on 12 November 1968 constitutes illegal spot zoning in that it zoned defendants Swaim's property "for a specific (sic) opposed use detrimental

to the surrounding area under the zoning jurisdiction of the City of Randleman."

The zoning ordinance of 12 November 1968 singles out and reclassifies a relatively small tract of land owned by defendants Swaim which is surrounded by a much larger area uniformly zoned, and relieves the Swaim property from restrictions which the remainder of the much larger area is called upon to assume.

ADJUDICATION

The ordinance of 12 November 1968 is declared invalid, and unenforceable from the beginning.

The court also continued in full force and effect a preliminary injunction issued on 11 July 1974. Defendants appealed.

Ottway Burton and Millicent Gibson for plaintiff appellees.

Moser and Moser, P.A., by D. Wescott Moser, for defendant appellants Swaim, and Bell and Ogburn, P.A., by John N. Ogburn, Jr., for defendant appellants The City of Randleman and Phil Pendry.

BRITT, Judge.

The validity of the comprehensive zoning ordinance adopted by defendant city on 9 May 1967 is not challenged by any party to this action. Two major questions are raised by the pleadings: (1) the validity of the 12 November 1968 rezoning ordinance, and (2) laches on the part of plaintiffs. We will discuss the questions in that order.

The burden was on plaintiffs to show that the 12 November 1968 rezoning ordinance was invalid. *State v. Joyner*, 286 N.C. 366, 211 S.E. 2d 320 (1975).

We find no merit in plaintiffs' contention that the rezoning ordinance is invalid because they had no notice of the 12 November 1968 meeting of the governing board of defendant city. The court found, on competent evidence, that a notice of a public hearing as required by law was duly published in a newspaper circulated in Randolph County on 24 September and 1 October 1968. We hold that the notice was sufficient. *Walker v. Elkin*, 254 N.C. 85, 118 S.E. 2d 1 (1961).

We think plaintiffs' contention and the court's conclusion that the action of defendant city in adopting the challenged rezoning ordinance constituted spot zoning has merit. In *Blades v. City of Raleigh*, 280 N.C. 531, 549, 187 S.E. 2d 35, 45 (1972), in an opinion by Justice Lake, we find:

> "A zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected, is called 'spot zoning.' It is beyond the authority of the municipality, in the absence of a clear showing of a reasonable basis for such distinction. . . . " (Numerous citations.)

[1] The evidence showed that while the classification for the approximately four acres of land owned by defendants Swaim was changed by the challenged ordinance, the classification for approximately five hundred acres owned by plaintiffs and others was not changed, thereby relieving the small tract from restrictions to which the rest of the area was subjected. Defendants attempted to show that the change was justified by a shortage of housing in the Randleman area in 1968 but their evidence failed to show that rezoning the Swaim property made any material contribution to meeting a housing shortage. In the absence of a clear showing of a reasonable basis for its action, defendant city exceeded its authority in adopting the rezoning ordinance.

We now consider the defense of laches pleaded by defendants. While plaintiffs successfully attack the validity of the rezoning ordinance, they are not entitled to relief if they are guilty of laches.

Laches is an affirmative defense which must be pleaded and the burden of proof is on the party who pleads it. *Poultry Co. v. Oil Co.*, 272 N.C. 16, 157 S.E. 2d 693 (1967), and cases therein cited. Having pled the defense, defendants assign as error the failure of the trial court to make any finding, reach any conclusion or otherwise rule on their plea. This assignment raises the question whether the evidence was sufficient to establish a prima facie showing of laches and to require a finding and conclusion by the court.

In *Teachey v. Gurley,* 214 N.C. 288, 294, 199 S.E. 83, 88 (1938), in an opinion by Justice (later Chief Justice) Barnhill, we find:

> " . . . In equity, where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim, the doctrine of laches will be applied. Hence, what delay will constitute laches depends upon the facts and circumstances of each case. Whenever the delay is mere neglect to seek a known remedy or to assert a known right, which the defendant has denied, and is without reasonable excuse, the courts are strongly inclined to treat as fatal to the plaintiff's remedy in equity, even though much less than the statutory period of limitations, if any injury would otherwise be done to the defendant by reason of the plaintiff's delay. . . . "

In *Taylor v. City of Raleigh,* 290 N.C. 608, 227 S.E. 2d 576, (filed 1 September 1976), opinion by Chief Justice Sharp, we find the following:

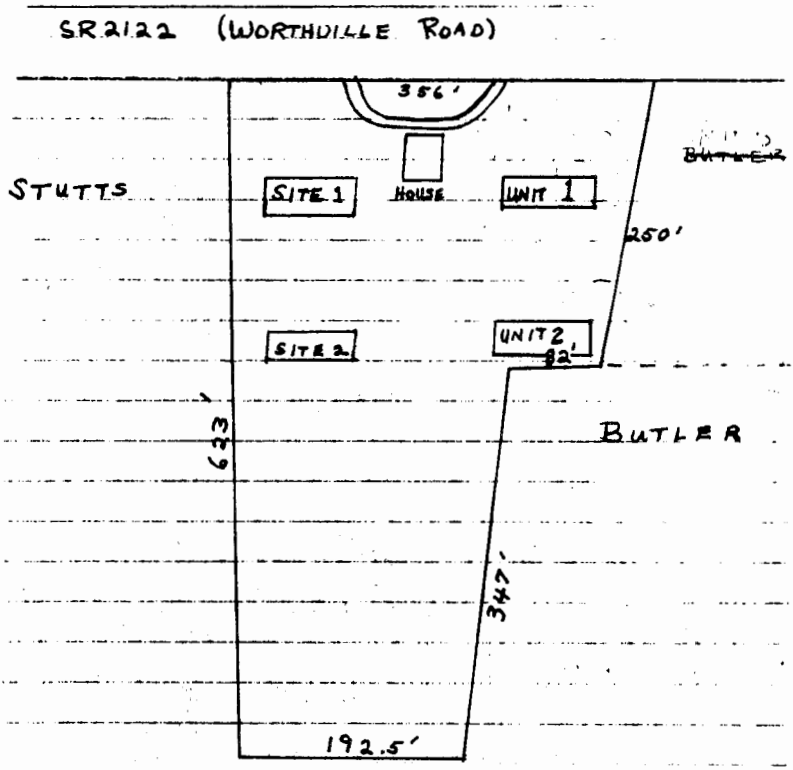
> A property owner having standing to attack a zoning ordinance or amendment thereof may do so in an action under G.S. 1-254 (1969) for a declaratory judgment. (Citations.)
>
> "Since proceedings for declaratory relief have much in common with equitable proceedings, the equitable doctrine of laches has been applied in such proceedings. But the mere passage or lapse of time is insufficient to support a finding of laches; for the doctrine of laches to be sustained, the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke it." 22 Am. Jur. 2d *Declaratory Judgments* § 78 (1965). *See also,* 101 C.J.S. *Zoning* § 354 (1958).

[2] We now review the evidence presented at the trial to determine if there was any showing that the lapse of time between the date of enactment of the challenged ordinance, 12 November 1968, and the date of the institution of this action, 5 June 1974, "resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution" of plaintiffs' claim; or, as stated in *Taylor,*

to determine if the delay was unreasonable and "worked to the disadvantage, injury or prejudice" of defendants Swaim.

Included in the record, labeled Exhibit A, is a purported map of the property of defendants Swaim. As an aid to understanding the testimony, the map is reproduced as follows:

EXHIBIT A



Plaintiff Harold Stutts' testimony is summarized in pertinent part thusly: He has been familiar with the subject property since 1971 at which time there was one mobile home on the Swaim property. There was only one mobile home on the property until 1973. In June or July of that year he had a conversation with defendant Thomas Swaim who at that time was asked about a second mobile home that he had recently

placed on his property. Mr. Swaim replied that he had no intention of placing any more mobile homes on his land; that it was too valuable for mobile homes and if he could get a loan, he was going to build a home adjacent to the Stutts property. In about March of 1974 Mr. Swaim had constructed a driveway near the Stutts line and had put in a well but the witness thought these improvements were related to a new home. At that time, when asked about his plans, Mr. Swaim stated that he was going to place additional mobile homes on his property as soon as he could get them. At the time of trial there was one house and four mobile homes located on the Swaim property; two additional spaces for mobile homes had been prepared. One of the last added mobile homes is located 22 feet from plaintiff Stutts' bedroom window and another one is located 100 feet from that window.

Plaintiff Harry Jessup testified that from 1968 until May of 1974 two mobile homes were located on the Swaim property and they were located back of the house. He knew in 1973 that defendants Swaim were "digging water" on their property and constructing a road next to the Stutts line.

Plaintiffs' witness Joyce Mills testified that a mobile home was placed on the Swaim property in 1968; that the next change she observed on that property was a well being drilled and a mobile home placed on Tract No. 3 and she thinks that was in 1974.

Plaintiffs who testified indicated that they knew nothing about the 1968 rezoning ordinance until 1973 or 1974.

The only witness presented by defendants was D. A. Moser who was a member of the Randleman Board of Aldermen in 1968 and testified with respect to the adoption of the challenged ordinance. Defendants presented no evidence regarding expenditures made by them pursuant to the passage of the ordinance. The record on appeal contains an affidavit by defendants Swaim filed 11 July 1974 (evidently in connection with the motion for a preliminary injunction) in which affidavit they related work done on their property in preparing it to accommodate mobile homes. We find nothing in the record showing that said affidavit was admitted as a part of the evidence at trial, therefore, it was not before the trial judge and will not be considered by us.

We hold that defendants failed to carry the burden of showing that the delay by plaintiffs in challenging the validity of the ordinance in question was unreasonable and that the delay worked to their disadvantage, injury or prejudice. Therefore, the trial judge did not err in failing to find facts and make conclusions with respect to defendants' plea of laches.

Defendants rely very heavily on the opinion of this court in *Taylor v. City of Raleigh*, 22 N.C. App. 259, 206 S.E. 2d 401 (1974), affirmed by the Supreme Court on 1 September 1976 and referred to above. We think the facts in that case are clearly distinguishable.

In *Taylor*, the rezoning ordinance challenged by plaintiffs was adopted on 21 December 1970 and the action was instituted on 12 January 1973. Defendants filed answer pleading, among other things, laches and thereafter defendant city moved for summary judgment on the ground that there was no genuine issue as to any material fact and defendants were entitled to judgment as a matter of law. Undisputed documentary evidence presented to the trial court showed that the impact of the rezoning ordinance on any of the plaintiffs was minimal; that plaintiffs were among those who protested the rezoning of the land in question; and that during the more than two years interval the defendant developer had spent more than $23,000 in architects, attorneys and engineering fees related to the subject property.

While the time lag in the instant case was greater than was true in *Taylor*, the evidence in this case disclosed no change in position by defendants Swaim until June or July 1973, and at that time they led plaintiffs to believe that they were not developing a mobile home park. Very soon after plaintiffs learned of the real intentions of defendants Swaim, they instituted this action.

For the reasons stated, the judgment appealed from is

Affirmed.

Judges HEDRICK and MARTIN concur.

INDUSTRIAL METAL TREATING CORPORATION v. T & D REALTY COMPANY, INC., GEORGE A. TRAKAS, AND GEORGE DIAMADUROS

No. 7626SC218

(Filed 15 September 1976)

Landlord and Tenant § 17— leased premises destroyed by fire — duty of lessor to restore

Where the premises leased by the corporate defendant to plaintiff were so badly damaged by fire as to be rendered wholly unfit for occupancy by plaintiff, defendant was obligated by the terms of the lease agreement to restore the leased premises provided that they could be restored with reasonable diligence within 120 working days.

APPEAL by plaintiff from *Martin (Harry C.), Judge.* Judgment entered 7 November 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 June 1976.

This is a civil action in which plaintiff seeks to recover damages for breach of an agreement in a lease to restore premises which were destroyed by fire.

On 21 September 1964 the corporate defendant, T & D Realty Company, Inc., as lessor, and plaintiff, as lessee, executed a written lease on a parcel of land in Charlotte, N. C., by which T & D agreed at its expense to construct on the land a 9,000 square foot one-story building and to complete the building within 120 working days of the signing of the lease. This was done, and plaintiff entered into occupancy of the building as lessee.

The term of the lease began on 1 January 1965 and extended for ten years from that date, with the lessee being granted an option to renew for an additional five years. By a separate instrument, which was dated and executed on the same day as the lease, the plaintiff was granted an option to purchase the lands and premises described in the lease at an option price which started at $60,000.00 and declined each year after the fifth year of the lease. Plaintiff continued in possession of the leased premises as lessee of T & D until 25 June 1973, when the leased building was so badly damaged by fire as to render it wholly unfit for occupancy.

Paragraphs 12, 13, and 14 of the lease are as follows:

"12. *Partial Destruction by Fire or Other Casualty.* If the premises hereby leased shall be partially damaged

by fire or other casualty at any time during the same term, the same shall be repaired and restored as speedily as possible at the expense of the Lessor, and a proportionate reduction of rent shall be allowed to the Lessee for the time occupied in such repairs, excepting:

A. If the Lessee can use and occupy the demised premises without substantial inconvenience, there shall be no reduction of rent.

B. If said repairs are delayed because of the failure of the Lessee to adjust its own insurance, no reduction shall be made beyond a reasonable time allowed for such adjustment.

13. *Complete Destruction by Fire or Other Casualty.* If the premises hereby leased are so badly damaged by fire or other casualty, or any contingency beyond the control of the Lessor, as to render the same wholly unfit for occupancy by the Lessee, and if the premises cannot be restored with reasonable diligence within one hundred twenty (120) working days after the commencement of actual work, then this lease may be terminated within the period of thirty (30) days after such disaster, by either party, on written notice to the other; whereupon, the Lessee shall surrender the premises and shall not be liable for any further rental, and the Lessor shall refund any unearned rent paid by the Lessee calculated at a daily rate based on the regular monthly rental.

14. *Loss by Fire.* In the event that all or any portion of the building or buildings located upon the leased premises are destroyed by fire, Lessee shall not be held liable by the Lessor for any loss by fire to any part or all of said building or buildings located upon the leased premises unless such loss results from the negligence of the Lessee, its agents, servants, employees, invitees, or licensees, and then only to the extent of the actual loss incurred by Lessor reduced by any payments received by Lessor from fire insurance carried on the leased premises."

Other paragraphs of the lease will be referred to in the opinion.

By letter dated 28 June 1973, plaintiff, contending that the premises could be restored within reasonable diligence within

120 working days, called upon T & D to do so. T & D refused and instead, by letter dated 2 July 1973, notified plaintiff that it was terminating the lease pursuant to paragraph 13 of the lease agreement.

On 31 July 1973 plaintiff filed this action, originally against T & D as the sole defendant, and alleged in its complaint facts substantially as above set forth. Subsequently, the two individual defendants were joined as additional parties, and plaintiff filed an amended complaint in which it alleged in substance the following additional facts: that the individual defendants are the sole stockholders and directors of T & D, each owning 50% of the outstanding stock; that after this action was commenced, T & D received $47,500.00 from its fire insurer on account of the fire damage to the leased premises; that the fire insurance proceeds were disbursed by paying the mortgage on the premises, by paying the defendant Diamaduros $5,200.00 on a debt he claimed from T & D, and by disbursing the remaining insurance proceeds, approximately $26,000.00, equally to the two individual defendants; that such payments to the individual defendants were made without adequate consideration, without making adequate provision for creditors of T & D, and while T & D was insolvent; and that such distribution of assets of T & D constitutes a fraudulent conveyance by T & D and the individual defendants and a breach by the individual defendants of their responsibilities as directors and stockholders.

Defendants filed answer in which they admitted execution of the lease, erection of the building, and plaintiff's occupancy until 25 June 1973. Defendants admitted "that on that date the building was so badly damaged by fire as to render it wholly unfit for occupancy." Defendants denied the remaining material allegations of the plaintiff and alleged that the lease was terminated by T & D's letter to plaintiff dated 2 July 1973 when T & D "determined that under paragraph 13 of the Lease Agreement the premises could not be restored with reasonable diligence within 120 working days after the commencement of actual work."

At the trial, plaintiff presented evidence in support of its allegations. Defendants did not offer evidence. Defendants' mo-

tions for a directed verdict were denied, and issues were submitted to the jury and answered as follows:

"1. Could the leased premises be restored with reasonable diligence within one hundred twenty (120) working days?

ANSWER: Yes

2. If so, did defendant, T & D Realty Company, Inc., wrongfully fail to restore the leased premises?

ANSWER: Yes

3. What amount of damages, if any, is plaintiff, Industrial Metal Treating Corporation, entitled to recover from defendant, T & D Realty Company, Inc.?

ANSWER: $75,000

4. Did defendants, George A. Trakas and George Diamaduros, violate their duty as directors of defendant, T & D Realty Company, Inc., by paying its fund to themselves without making adequate provision for known obligations?

ANSWER: Yes

5. Did defendants, George A. Trakas and George Diamaduros, violate their duty as stockholders of defendant, T & D Realty Company, Inc., by receiving a distribution of funds from defendant, T & D Realty Company, Inc., whereby defendant, T & D Realty Company, Inc., would be rendered unable to meet its obligations?

ANSWER: Yes

6. Did defendants, George A. Trakas and George Diamaduros, fraudulently transfer funds from defendant, T & D Realty Company, Inc., to themselves, without permitting defendant, T & D Realty Company, Inc., to retain funds to pay its obligations?

ANSWER: Yes

7. Did defendants, George A. Trakas and George Diamaduros, completely dominate defendant, T & D Realty Company, Inc., as their mere instrumentality, and did they use the corporation to commit a wrong or unjust act in

violation of their duty to plaintiff, and cause harm to plaintiff?

ANSWER: Yes"

Defendants moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. The court granted defendants' motion for judgment notwithstanding the verdict, but denied their alternative motion for a new trial. In denying the motion for a new trial, the court stated that it did so "on the grounds that in the event the ruling of this Court on defendants' Motion for Judgment Notwithstanding the Verdict is reversed on appeal, then the corporate defendant would be under the legal duty to repair or restore the building on the leased premises." Plaintiff appealed.

Weinstein, Sturges, Odom, Bigger & Jones, P.A., by Maurice A. Weinstein and Richard A. Bigger, Jr., for plaintiff appellant.

McCartha & Bryant by C. Eugene McCartha, and Garland & Alala by Jerry G. Drum for defendant appellees.

PARKER, Judge.

There was ample evidence to support the verdict. Therefore, the question presented by plaintiff's appeal is whether, under the facts as established by the verdict or by admissions in the pleadings, the corporate defendant was obligated by the lease agreement to restore the damaged building. We hold that it was, and accordingly we reverse the judgment n.o.v.

Under the facts established by the verdict or by admissions in the pleadings, neither party had a right to terminate the lease. Paragraph 13 of the lease granted that right only if two conditions should co-exist: (1) that the leased premises be so badly damaged by fire or other casualty as to render the same wholly unfit for occupancy by the lessee *and* (2) that the premises could not be restored with reasonable diligence within 120 working days after commencement of actual work. Existence of the first condition was admitted in the pleadings. As to the second, however, the jury found on competent evidence that the leased premises could be restored with reasonable diligence within 120 working days. Therefore, since one of the two conditions required to give rise to the right of termination did not exist, neither party had the right to terminate, and the corporate

defendant's attempt to do so was legally ineffectual. Thus, the question presented for our decision is whether the lease agreement imposed on the corporate defendant, as lessor, the duty to restore the leased premises in event (1) the premises were so badly damaged by fire as to be rendered wholly unfit for occupancy by the lessee, and (2) the premises could be restored with reasonable diligence within 120 working days. This question presents a problem of contract interpretation.

"The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Electric Co. v. Insurance Co.*, 229 N.C. 518, 520, 50 S.E. 2d 295, 297 (1948). "When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law. The court determines the effect of their agreement by declaring its legal meaning." *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E. 2d 622, 624 (1973).

"Intention or meaning in a contract may be manifested or conveyed either expressly or impliedly, and it is fundamental that that which is plainly or necessarily implied in the language of a contract is as much a part of it as that which is expressed. If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect, the law will imply the obligation and enforce it. The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted or to have been deemed perfectly obvious by the parties, the parties being supposed to have made those stipulations which as honest, fair, and just men they ought to have been." 17 Am. Jur. 2d, Contracts, § 255, p. 649.

Applying the foregoing principles to the construction of the lease agreement before us in the present case, we note initially that at the time the lease was executed, the parties must have contemplated that only in unusual circumstances would it not be possible to restore the building within 120 working days. The lease provided that the lessor should build the building initially within that time period, and this was actually accomplished. Therefore, the parties must have con-

templated that under normal circumstances the termination provision in paragraph 13 would not become effective. Apparently that paragraph was included to take care of the possible, but unlikely, eventuality that abnormal conditions might exist in the building industry at the time a fire or other casualty should occur. Turning to other provisions in the lease, we find that paragraph 7 provides that the Lessor "shall pay . . . fire, windstorm, and hail insurance premiums on the leased premises." Even though the lease does not expressly specify the amount of such insurance to be carried, the reasonable implication is that it should be in a reasonable amount relative to the value of the property, the cost of the premiums, and the risk involved. Paragraph 14 provides that in event of fire, the Lessee is not to be held liable by the Lessor for any loss unless such loss results from the negligence of the Lessee "and then only to the extent of the actual loss incurred by Lessor reduced by any payments received by Lessor from fire insurance carried on the leased premises." Thus, the Lessee is under no liability for a fire loss not caused by its negligence, and even in that event the Lessee is to have full benefit of any insurance proceeds to reduce the extent of its liability. Paragraph 8 provides that the "Lessor shall maintain and keep in good repair the roof, outside walls, foundation, drainage, outside plumbing, electrical attachments and gas of the leased premises," while the Lessee is required only to maintain the "interior walls, floors and ceilings," to "take care of all damage, breakage and repairs to doors and outside windows," and to "bear the cost of maintenance and repair" of the toilet, heat and air conditioning, lighting, electric, water, and telephone utilities. Finally, and most importantly, paragraph 12 provides that if the leased premises shall be "partially" damaged by fire, "the same shall be repaired and restored as speedily as possible at the expense of the Lessor." Considering all of these provisions together, the clear implication of the lease agreement is that the Lessor is obligated to restore the building, at its expense and as speedily as possible, in case it is damaged by fire but not to such extent that it cannot be restored with reasonable diligence within 120 working days. Having expressed their respective obligations in substantial detail throughout the lease, it is simply not reasonable to assume that the parties intended to leave unprovided for the eventuality which actually occurred, that is, a damage to the building by fire to such extent as to render it wholly unfit for occupancy but not to such extent that it could not be

restored with reasonable diligence within 120 working days. A more reasonable interpretation is that the parties considered the building so damaged to be "partially damaged" within the meaning of paragraph 12 of the lease. There was evidence in the present case that after the fire the outside walls of the building were still usable, and for that reason the building could be considered as only "partially damaged," even though it was wholly unfit for occupancy. As the facts of this case demonstrate, a building need not be totally destroyed to be rendered wholly unfit for occupancy. We hold that the clear implication of the express language of the lease agreement is that the Lessor was obligated in this case to restore the building at its expense and as speedily as possible. For breach of that obligation, the corporate defendant became liable to the plaintiff.

The corporate defendant, T & D, has filed two cross assignments of error as follows: first, that the court erred in its additional instructions to the jury explaining the word "wrongfully," and second, that the court erred in denying T & D's alternative motion for a new trial. We have carefully examined each of these and find no error. The portion of the court's charge to which exception was taken, when considered contextually with the charge as a whole, was not prejudicial to defendants. Indeed, the court's charge may have been more favorable to defendants than they were entitled to receive in that the court placed the burden on plaintiff to show, on the second issue, that the defendants did not have a "good faith belief" that the building could not be restored with reasonable diligence within 120 working days and that the corporate defendant "did not make any good faith effort to secure other insurance upon the property." The corporate defendant was under a contractual duty to restore the building regardless of its ability or efforts to obtain other insurance and regardless of its subjective belief, whether held in good faith or not, as to how long a time would be required to restore the building. We find no error such as to warrant the granting of a new trial.

The result is:

The judgment granting defendants' motion for judgment notwithstanding the verdict is reversed.

The judgment denying defendants' alternative motion for a new trial is affirmed.

This cause is remanded to the Superior Court in Mecklenburg County for entry of judgment on the verdict.

Reversed in part, affirmed in part, and remanded.

Chief Judge BROCK and Judge ARNOLD concur.

MARGARET ELEANORA GALLIMORE, MOTHER; JOHN ROY GALLIMORE, FATHER, OF BONNIE LYNN GALLIMORE, DECEASED, EMPLOYEE v. MARILYN'S SHOES, EMPLOYER, BITUMINOUS CASUALTY CORP., CARRIER

No. 7618IC172

(Filed 15 September 1976)

Master and Servant § 56— workmen's compensation — shoe store employee — kidnapping in parking lot — subsequent robbery and shooting — accident arising out of and in the course of employment

Evidence that decedent was an employee of a shoe store, as part of her employment duties she made up sales tickets, bank deposits and deposit slips and she had sometimes taken money to the bank to be deposited in her employer's account, on the day in question she left work and went to her car in a parking lot at the mall where her employer's store was located, decedent's assailant knew that the owner of a certain orange Vega (decedent's vehicle) often carried large sums of money, and decedent's assailant waited for her in the parking lot, forced her into the back seat of her car, and drove her car to a wooded area where he robbed and assaulted the decedent and killed her in an ensuing struggle *is held* sufficient to support a determination by the Industrial Commission that decedent's death resulted from an accident which arose out of and in the course of her employment.

Judge CLARK dissenting.

APPEAL by defendants from the opinion and award of the North Carolina Industrial Commission filed 3 September 1975. Heard in the Court of Appeals 28 May 1976.

Plaintiffs filed a claim for benefits payable under the North Carolina Workmen's Compensation Act contending that the death of their daughter Bonnie Lynn Gallimore on 3 November 1972 was a result of an injury by accident arising out of and in the course of employment.

This cause came on for hearing at High Point, North Carolina, before Deputy Commissioner Robert W. Whitfield on 26

September 1973, and further evidence in such case was heard by Commissioner Whitfield at Raleigh, North Carolina, on 5 April 1974.

Plaintiffs offered evidence tending to show that on 3 November 1972, the date of her death, decedent was employed by Marilyn's Shoes at the Westchester Mall in High Point. As part of her employment duties she made up sales tickets, bank deposits and deposit slips, and she had sometimes taken money to the bank to be deposited in her employer's account. Decedent's mother had met decedent at the bank as well as accompanied decedent to the bank to make deposits for her employer on at least two occasions during September and October just prior to the incident. On 3 November the decedent signed out of Marilyn's Shoes at 6:00 p.m. At about 6:00 p.m., a witness, David Westley Adams, saw decedent standing with a man by her car, an orange Vega, in the public parking lot at the mall. She sat down in the driver's seat and as she prepared to start the car, the man reached across her lap. The man then got into the driver's seat and the woman moved to the back of the car where she lay down on the back seat. The man started the car and drove away from the mall at a high speed. Subsequently Darrell Lee Young pleaded guilty to the murder of decedent.

Plaintiffs offered in evidence a confession signed by Young. The court at first excluded it but later treated it as having been admitted. In the confession Young stated that he went to the mall with Jerry Wayne Allen and observed an orange Vega. Allen told him that the girl who owned the Vega kept large sums of money, and it was agreed that Young would kidnap her and carry her to a wooded area where Allen would meet with him and together they would rob her. When decedent came out to the car, Young did kidnap her and take her to the wooded area, but Allen did not meet with him as planned. Young demanded decedent's pocketbook, and she gave it to him. He told her to get out of the car, and she did so, whereupon "I called her back and went toward her an started to put my arms around her . . . an my right arm came up in front of her and she hit it at which time the .22 caliber revolver went of shooting her in the chest."

The Deputy Commissioner held that decedent's death resulted from an accident which arose out of and in the course of

her employment, and he awarded death benefits to plaintiffs. His decision was affirmed by the Full Commission. Defendants appealed.

Harold I. Spainhour, for plaintiffs.

Horton, Singer & Michaels, by Walter L. Horton, Jr., for defendants.

MARTIN, Judge.

Appellants' first assignment of error is that the Commission erred in adopting the Deputy Commissioner's findings of fact, conclusions of law and award in that the Commissioner's findings of fact 1 through 16 are insufficient as a matter of law to support the conclusion that the decedent sustained an injury arising out of and in the course of her employment.

In determining if an injury is covered under the Workmen's Compensation Act, the only injury compensable is an " . . . injury by accident arising out of and in the course of employment." G.S. 97-2(6). Our Court, in interpreting this statute, stated in *Conrad v. Foundry Company,* 198 N.C. 723, 726, 153 S.E. 266, 269 (1930) that:

> "The words 'out of' refer to the origin or cause of the accident and the words 'in the course of' to the time, place, and circumstances under which it occurred. (Citations omitted.) There must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected. (Citation omitted.)"

In determining whether the evidence in the present case is sufficient to sustain the hearing Commissioner's ruling that the accident was covered by Workmen's Compensation, it is necessary for the court to examine both facets of this two-pronged test of arising "out of" and "in the course of."

The North Carolina Supreme Court has held that whether an injury "arises out of" the employment is to be decided on the basis of the facts of each individual case and cannot be precisely defined. See *Berry v. Furniture Co.,* 232 N.C. 303, 60 S.E. 2d 97 (1950); *Taylor v. Wake Forest,* 228 N.C. 346, 45

S.E. 2d 387 (1947). In addition, this Court has stated that "[i]n North Carolina there is no requirement that the injury should be foreseen if it resulted from the employment nor does the employment have to be the 'sole' cause of the injury; it is sufficient if there is 'some' causal connection between the employment and the injury. *Taylor v. Twin City Club,* 260 N.C. 435, 132 S.E. 2d 865 (1963); *Harless v. Flynn,* 1 N.C. App. 448, 162 S.E. 2d 47 (1968)." *Robbins v. Nicholson,* 10 N.C. App. 421, 425, 179 S.E. 2d 183, 185 (1971). The North Carolina Supreme Court has similarly stated that "[w]here *any reasonable relationship* to the employment exists, or employment is a contributory cause, the court is justified in upholding the award as 'arising out of employment.' (Citations omitted.)" *Allred v. Allred-Gardner, Inc.,* 253 N.C. 554, 557, 117 S.E. 2d 476, 479 (1960) (emphasis added). In the present case, there is sufficient evidence to support the Commissioner's finding that the decedent's accident arose out of her employment. Among other facts, the Commissioner found that: The decedent's duties as an employee included making up reports from sales tickets and making up bank deposits and deposit slips. The decedent's mother had met as well as accompanied the decedent to the bank to make deposits for her employer on at least two occasions. The decedent's assailant knew that the owner of a certain orange Vega (decedent's vehicle) often carried large sums of money. The decedent's assailant waited in the decedent's car in the mall parking lot until she got off work, forced her into the back seat of the car, and then drove off with her in the back seat to a wooded area where he robbed and assaulted the decedent and killed the decedent in an ensuing struggle. An examination of other North Carolina cases with similar fact situations reveals what evidence has been held to be sufficient to support a Commission ruling that the accident arose out of the employment. In the case of *Goodwin v. Bright,* 202 N.C. 481, 163 S.E. 576 (1932), an employee had to go to the employer's place of business earlier than other employees to fire a furnace. He was shot and killed in the boiler room between 5:00 and 7:00 a.m. by an unknown robber who took his money and his automobile. The North Carolina Supreme Court held the death compensable because of the risks incidental to the employment. In addition, the Court quoted an earlier case that "[t]he mere fact that injury is the result of the willful or criminal assault of a third person does not prevent the injury from being accidental. (Citation omitted.)" *Goodwin v. Bright, supra*

at 484 and 577. Similarly, in *West v. Fertilizer Co.*, 201 N.C. 556, 160 S.E. 765 (1931), it was held that evidence tending to show that the deceased employee was killed as a result of an injury received while on duty as a night watchman in his employer's plant, and that he had been robbed by his assailant when the injury was inflicted, was sufficient to sustain the Industrial Commission's finding that the injury arose out of and in the course of the employment. In both *Goodwin* and *West*, the Court referred to the risk the employee was subjected to in his employment. In the instant case, the deceased employee, as shown by the evidence, was exposed to a risk which might have been contemplated by a reasonable person as incidental to her employment.

With respect to the requirement that the accident arise "in the course of" employment, the Court has stated that "in the course of" refers to the time, place, and circumstances. *Conrad v. Foundry Company, supra.* It has been held that the time of employment includes the working hours as well as such reasonable time as is required to pass to and from the employer's premises. *Yates v. Hajoca Corp.*, 1 N.C. App. 553, 162 S.E. 2d 119 (1968). "With respect to the place, the course of employment includes the premises of the employer." *Harless v. Flynn, supra.* Finally, with respect to circumstances, the North Carolina Supreme Court has stated that " . . . the great weight of authority holds that injuries sustained by an employee while going to or from his place of work upon premises owned or controlled by his employer are generally deemed to have arisen out of and in the course of the employment within the Workmen's Compensation Acts and are compensable, provided the employee's act involves no unreasonable delay. (Citations omitted.)" *Bass v. Mecklenburg County,* 258 N.C. 226, 232, 128 S.E. 2d 570, 574 (1962). Moreover, it has been held that where the employer provides a parking lot on its premises and permits its employees to park their cars in the lot, an injury received by an employee while walking to or from his or her car to that part of employer's premises where the employee works, is an injury arising out of and in the course of employment. See *Davis v. Devil Dog Mfg. Co.*, 249 N.C. 543, 107 S.E. 2d 102 (1959). In the instant case, the evidence shows that the initial accident leading to the chain of events resulting in decedent's death occurred while the decedent employee was going to her car in a parking lot at the mall where the employer's premises

was located. There was no evidence to the contrary that the decedent did not go straight to her car after leaving work at 6:00 p.m. Under these facts, this Court finds that the decedent's accident was in the course of her employment.

In construing Workmen's Compensation Acts, "[t]his and other courts of the United States have held that the various compensation acts should be liberally construed so that the benefits thereof should not be denied upon technical, narrow and strict interpretation. The primary consideration is compensation for injured employees." *Barbour v. State Hospital,* 213 N.C. 515, 518, 196 S.E. 812, 813 (1938). In keeping with this rule of liberal construction, this Court is of the opinion that the injury resulting in death in this case arose out of *and* in the course of the employment.

Appellants assign as a second assignment of error that the Industrial Commission erred in adopting the findings of fact, conclusions of law and award of the Deputy Commissioner and in affirming the results reached by him in that there is no competent evidence to support findings of fact 12 through 17 to the extent that such facts purport to support an inference that the decedent's death arose out of and in the course of the employment.

More specifically, the appellants argue that the Commissioner partly based his findings on evidence that was incompetent since it was hearsay. At the hearings by the Commissioner, the appellants objected to those facts which tended to connect the robbery motive of the assailant to the decedent's status as an employee of Marilyn's Shoes. The hearsay objection was directed to that portion of the assailant's confession and to his later testimony in which he stated that his co-conspirator had told him just prior to the robbery that the owner of the 1972 Vega (decedent's automobile) "was a female and that she kept large sums of money on her which prior to this incident he had been watching." The appellants argue that the Commissioner admitted this evidence and later based part of his decision on it and that without this evidence there would be insufficient competent evidence to support a ruling that the injury to the decedent arose out of and in the course of employment.

The hearsay rule has often been stated as follows: "Evidence, oral or written, is called hearsay when its probative force depends in whole or in part upon the competency and

creditability of some person other than the witness by whom it is sought to produce it. (Citations omitted.)" *Chandler v. Jones*, 173 N.C. 427, 92 S.E. 145 (1917); *King v. Bynum*, 137 N.C. 491, 495, 49 S.E. 955, 956 (1905). "Expressed differently, whenever the assertion of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the evidence so offered is hearsay. If offered for any other purpose, it is not hearsay." Stansbury, N. C. Evidence, § 138 (Brandis Rev. 1973). Here, the confession and testimony by the assailant concerning his conversation with his co-conspirator was not offered to prove the truth of the fact that the decedent was a female and that she often carried large sums of money. The evidence was relevant to the decedent's assailant's state of mind and tended to show motive, and was properly admitted and relied upon by the Commissioner.

We have carefully considered the appellants' other assignments of error and find them to be without merit.

Affirmed.

Judge VAUGHN concurs in result.

Judge CLARK dissents.

Judge CLARK dissenting.

The evidence does not support the finding or conclusion of the Commission that the assault upon Bonnie Lynn Gallimore was an accident arising out of her employment. Considering all the circumstances there was not a causal connection between the conditions under which her work was performed and the resulting assault and death. See *Robbins v. Nicholson*, 281 N.C. 234, 188 S.E. 2d 350 (1972).

MICHAEL ANDREW TOWNSEND, BY HIS GUARDIAN AD LITEM, GALE W. CARTER AND GALE W. CARTER v. NOAH AKERS FRYE

No. 7622SC309

(Filed 15 September 1976)

1. Automobiles § 90— assumption that motorist will stop for traffic signal — instructions

In this action to recover for injuries received by a minor bicyclist when he was struck by defendant's car at an intersection controlled

by a traffic signal, the trial court erred in failing to instruct the jury on the right of a motorist, including a bicyclist, in the absence of anything which should give him notice to the contrary, to assume and to act on the assumption that other drivers will observe the rules of the road and stop in obedience to a traffic signal.

2. **Automobiles § 90; Negligence § 18— minor between 7 and 14— presumption of incapability of contributory negligence**

In an action to recover for injuries sustained by a twelve-year-old bicyclist, the trial court erred in failing to instruct that a minor between the ages of seven and fourteen is presumed incapable of contributory negligence.

3. **Parent and Child § 5— parent's action for loss of services and medical expenses — contributory negligence of child**

In a consolidated trial of a minor child's action for personal injuries and the mother's action for loss of services and medical expenses of the child, a finding of contributory negligence on the part of the child will bar the mother's action for loss of services and medical expenses.

APPEAL by plaintiffs from *Crissman, Judge.* Judgment entered 11 December 1975 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 26 August 1976.

These are actions wherein the plaintiff, Michael Andrew Townsend, by his guardian ad litem Gale W. Carter, seeks to recover damages from defendant in the amount of $50,000 on account of injuries which he received when his bicycle collided with defendant's automobile and in which Michael's mother, plaintiff Gale W. Carter, seeks to recover $4500.00 for loss of services of her child and incidental expenses arising out of the collision. The child's father is dead.

Michael Townsend's testimony was, in substance, as follows:

He was riding his bicycle on the sidewalk on Cotton Grove Road headed in a southerly direction when he reached the intersection of Cotton Grove Road and Guilford Street, which is a "T" intersection, with Cotton Grove Road forming the top of the "T." As he was about to turn into the intersection and proceed across Cotton Grove Road, the traffic signal for vehicles travelling on Cotton Grove Road was emitting a red signal. Vehicles travelling in a southerly direction on Cotton Grove Road had stopped at the intersection. [The traffic light at this "T" intersection does not emit a signal for one entering the intersection from the side from which Michael entered.] He

then entered the intersection because he thought that he had the protection of a red light. His first specific observation of defendant's vehicle was when he was already in the intersection and heard the sound of the defendant's squalling tires. He was 12 years old at the time of the accident.

One of plaintiffs' witnesses, Darrell Varner, testified that he was travelling south on Cotton Grove Road. As he approached the intersection of Cotton Grove Road and Guilford Street, the light was in the caution position and he was coming to a stop when the accident occurred.

Mrs. Gale W. Carter testified that she had several conversations with the defendant about the accident and that he told her that his mind was "a thousand miles away" on that afternoon. She testified that he also said to her, "I looked up and saw the light was red and I could not get stopped; I turned the car so that front wheel would not get him." She further testified that her son told her a few days after the accident that the light was red for the vehicles travelling on Cotton Grove Road, and that this was the reason why he proceeded into the intersection.

Officer Jim Truell testified that the defendant told him that he was coming up Cotton Grove Road, saw the light changing and when he saw the bicycle he couldn't stop.

Officer Jerry Howell testified that there were 30 feet of skid marks leading from the front of defendant's car back to a point outside the intersection.

The defendant testified that he was driving his car in a northerly direction on Cotton Grove Road at a speed of approximately 20 miles per hour. As he reached the intersection of Cotton Grove Road and Guilford Street, the overhead light was "leaving green." As he got into the intersection the light was changing from green. He first saw the bicycle when he was already in the intersection. Upon seeing the bicycle in front of him, he applied his brakes and turned to his left in order to avoid hitting the bicycle head on. He denied telling Mrs. Carter that his mind was a thousand miles away on that date, that the light was red when he looked up, and that he just could not stop when he saw Michael on the bicycle in front of him.

The jury found that both defendant and Michael Townsend had been negligent. Judgment was entered dismissing both of the plaintiffs' actions. Plaintiffs appealed.

Walser, Brinkley, Walser and McGirt, by G. Thompson Miller, for plaintiff appellants.

Henson & Donahue, by Perry C. Henson, Kenneth R. Keller and Richard I. Vanore, for defendant appellee.

VAUGHN, Judge.

All of appellants' assignments of error are directed to the charge of the court.

[1] Plaintiffs assign as error the failure of the trial judge to instruct the jury with respect to a motorist's right, in the absence of anything which should give him notice to the contrary, to assume and to act on the assumption that other drivers will observe the rules of the road and stop in obedience to a traffic signal. We agree that this principle of law arose on the evidence in the case and that the court failed to give the appropriate instruction.

In *Lowe v. Futrell*, 271 N.C. 550, 157 S.E. 2d 92, it was held that "a bicycle is a vehicle and its rider is a driver within the meaning of the Motor Vehicle Law. G.S. 20-38(38)." G.S. 20-4.01(49). The North Carolina Supreme Court, in *Wrenn v. Waters*, 277 N.C. 337, 177 S.E. 2d 284, reaffirmed the rule that when instructing a jury as to the contributory negligence issue, the judge must instruct the jury that in the absence of anything which gives or should give notice to the contrary, a motorist has the right to assume and to act on the assumption that opposing drivers will observe the rules of the road and stop in obedience to a traffic signal and that failure to so charge is prejudicial error that requires a new trial.

This Court in *Houston v. Rivens*, 22 N.C. App. 423, 206 S.E. 2d 739, held that the specific language of *Wrenn v. Waters, supra*, need not be employed if the instruction given, when viewed as a contextual whole can be found to be tantamount to an instruction on the plaintiffs' right to assume that other motorists would comply with the rules of the road. In the case at bar, however, a review of the entire charge discloses that the judge failed to give an instruction equivalent to what was required. The judge did tell the jury that plaintiff "says and contends . . . that . . . he had the right to believe that the defendant would observe the traffic light. . . . " It is fundamental, however, that the judge must explain and apply the law to the

specific facts of the case. A statement of what the parties contend the law to be is insufficient.

[2] Plaintiffs also assign as error the failure of the judge to instruct the jury that a child between the ages of 7 and 14 is presumed to be incapable of contributory negligence. In the case of *Hoots v. Beeson,* 272 N.C. 644, 159 S.E. 2d 16, the Supreme Court held that when contributory negligence is an issue and a minor between the ages of 7 and 14 is the plaintiff, the trial court must instruct the jury that there is a rebuttable presumption that an infant between the ages of 7 and 14 years is incapable of contributory negligence. The presumption runs in favor of the child and must be overcome by the defendant. This presumption may be overcome with evidence showing that " . . . the child did not use the care which a child of its *age, capacity, discretion, knowledge,* and *experience* would ordinarily have exercised under the same or similar circumstances." *Hoots v. Beeson, supra,* at 651. The presumption is a substantial feature of the case. In the case at bar the judge not only failed to state the presumption but failed to state the complete standard by which it could be rebutted.

[3] The final assignment of error relates to the judge's instruction that if they found the minor plaintiff contributorily negligent, they should not consider the damage issue on the mother's claim for loss of service and medical expenses. The judge's decision being, of course, that the minor's contributory negligence would bar recovery by the mother. The action for the minor's injuries was brought by the mother as guardian ad litem. The mother's own action for loss of the child's service was consolidated for trial with the minor's action and the same counsel represented both plaintiffs. The mother, of course, participated in the consolidated trial.

The precise question thus presented does not appear to have been answered by the Supreme Court. In *Kleibor v. Rogers,* 265 N.C. 304, 144 S.E. 2d 27, the father brought suit to recover for loss of his son's services and for medical expenses. Defendant denied negligence and pleaded the son's contributory negligence. In an earlier action brought by the son through his mother as next friend, the jury had found contributory negligence on the part of the son. Judgment in accordance with the verdict had been entered. Defendant in *Kleibor* pleaded the prior

judgment as *res judicata.* On appeal the Supreme Court said: "The sole question presented on this appeal is whether the fact the contributory negligence issue was answered 'yes' in the prior action, standing alone, constitutes a bar to this action." *Kleibor v. Rogers, supra,* at 306, 307. The Court, noting the absence of identity of parties and the absence of an allegation that the father participated in the earlier action, held that the bare plea of the verdict did not bar the action. The Court went on to say, however, that:

> "Unquestionably, the contributory negligence of his minor son, *if established in this action,* would constitute a bar to plaintiff's recovery herein. See Lee, op. cit. p. 118, note 53, for supporting authorities." *Kleibor v. Rogers, supra,* at 306.

Notwithstanding what would seem to be the unequivocal language of the Supreme Court which we have just quoted, we must take note of language found in a later decision. In *Clary v. Board of Education,* 285 N.C. 188, 203 S.E. 2d 820, an action was instituted by a father as guardian ad litem for his minor son. The father also started an action for medical expenses incurred by him for his son's injuries. The son was injured while practicing basketball at a school operated by defendant. The cases were consolidated for trial. The trial court's dismissal of both actions, because of the son's contributory negligence, was affirmed by the Court of Appeals. *Clary v. Board of Education,* 19 N.C. App. 637, 199 S.E. 2d 738. After review by the Supreme Court, that Court affirmed but not for the reasons stated by the trial court or the Court of Appeals. The Supreme Court concluded that plaintiffs had not offered sufficient evidence to take their cases to the jury (on matters not material here).

It is the Court's comment on the question of the effect of the son's alleged contributory negligence on the father's action that is relevant to our decision here. The Court said:

> "In each action, the Superior Court granted the defendant's motion for a directed verdict on the ground that the child was guilty of contributory negligence. There was neither allegation nor evidence of contributory negligence by the father himself or that the child, at the time of the injury, was acting as the father's agent." *Clary v. Board of Education, supra,* at 193.

After its holding that plaintiff had failed to make a case for the jury, the Court went on to say that "we do not reach and we express no opinion" on the following questions:

> "(2) Did the evidence of the plaintiffs show that the plaintiff child, in carrying out his assignment, was guilty of contributory negligence as a matter of law? (3) If so, does such contributory negligence of the child bar the father's right to recover in his action?" *Clary v. Board of Education, supra,* at 193.

Later the Supreme Court allowed plaintiffs' petition for a rehearing of the case. After the rehearing the Court withdrew its earlier decision and remanded the cases for a new trial in the Superior Court. *Clary v. Board of Education,* 286 N.C. 525, 212 S.E. 2d 160. In that decision the Court held that the evidence would permit but not require findings that defendant was negligent and that the minor plaintiff was contributorily negligent. The Court thus gave a negative answer to a question posed in its first decision in this case: "(2) Did the evidence of the plaintiffs show that the plaintiff child . . . was guilty of contributory negligence as a matter of law?" The Court was not presented with and did not comment on the final question posed in its first decision: "If so, does such contributory negligence of the child bar the father's right to recover in his action?" That question, however, has been presented in the case before us and must be answered. We hold that if, at the new trial, the child is found to have been contributorily negligent, the child's contributory negligence will bar the mother's right to recover for loss of the child's services and medical expenses for the child. It appears that our holding is consistent with that of most of the courts in other jurisdictions that have decided the question.

For the reasons heretofore stated, there must be a new trial.

New trial.

Judges MORRIS and CLARK concur.

TIFCO, INC., A MARYLAND CORPORATION v. INSURANCE DESIGNERS UNDERWRITERS GROUP, INC., a/k/a INSURANCE DESIGNERS UNDERWRITERS GROUP, LTD., a/k/a INSURANCE UNDERWRITERS GROUP, LTD., INC.; CROWN MORTGAGE COMPANY, INC., a/k/a CROWN MORTGAGE COMPANY, a/k/a CROWN MORTGAGE CORRESPONDENTS, INC.; RODNEY BUDWEY; PHILIP M. WILSON, a/k/a P. M. WILSON; JOHN R. MACARI; SHIRLEY S. MACARI; CENTRE HILL, INC.; NORTH CAROLINA NATIONAL BANK, WINSTON-SALEM, NORTH CAROLINA; AND FIRST VIRGINIA BANK OF ANNANDALE, VIRGINIA

No. 7621SC291

(Filed 15 September 1976)

Rules of Civil Procedure § 54— default judgment — relief granted different from relief sought — error

Where plaintiff sought to have lifted a ban against negotiation of certificates of deposit issued by defendant bank, the default judgment entered by the trial court ordering defendant bank to make payment of the certificates of deposit to plaintiff granted relief different in kind from the relief sought and was therefore excessive. G.S. 1A-1, Rule 54(c).

APPEAL by defendant North Carolina National Bank from *Crissman, Judge.* Judgment entered 22 January 1976 in Superior Court, FORSYTH County. Heard in the Court of Appeals 25 August 1976.

Tifco is in the business of financing insurance premiums. Primarily it finances insurance premiums which are originally financed by insurance agents for their insureds. The unearned premium and the right to cancel the policy constitute the collateral for a loan by Tifco.

Defendant Insurance Designers Underwriters Group, Inc. is also known as Insurance Designers Underwriters Group, Ltd. and as Insurance Underwriters Group, Ltd., Inc. It will hereafter be referred to as Underwriters.

Defendant Philip M. Wilson is the president or controlling officer of Underwriters.

Defendant Crown Mortgage Company, Inc. is also known as Crown Mortgage Company and as Crown Mortgage Correspondents, Inc. It will hereafter be referred to as Mortgage Co.

Defendant Rodney Budwey is president or controlling officer of Mortgage Co.

Defendants John R. Macari and Shirley S. Macari are husband and wife, and he is the president or controlling officer of Centre Hill, Inc.

Defendants North Carolina National Bank (hereafter referred to as NCNB) and First Virginia Bank of Annandale (hereafter referred to as Virginia Bank) are banking corporations with which some of the other defendants have done business.

Plaintiff alleged that Shirley S. Macari is the named owner of a negotiable certificate of deposit No. 63139 in the sum of $100,000.00 issued by NCNB and that Centre Hill, Inc. is the named owner of a negotiable certificate of deposit No. 63138 in the sum of $115,000.00 issued by NCNB.

Plaintiff alleged that Underwriters, Mortgage Co., Wilson, and Budwey conspired to defraud plaintiff by causing plaintiff to finance an insurance premium upon a nonexistent policy; that Underwriters, Mortgage Co., Wilson, and Budwey fraudulently represented to plaintiff that a policy of insurance had been issued to Macari, and fraudulently presented to plaintiff a premium financing statement; that in reliance upon these fraudulent representations, plaintiff issued its check No. 01639 to Underwriters and, as a result thereof, has been defrauded of the sum of $232,000.00. Plaintiff further alleges that Underwriters, Mortgage Co., Wilson, and Budwey have loaned some of plaintiff's monies to Macari and wife and have taken as security the NCNB certificates of deposit issued to Shirley S. Macari and Centre Hill, Inc.

Plaintiff sought judgment against Underwriters, Mortgage Co., Wilson, and Budwey for damages, and sought to enjoin all defendants from negotiating or permitting negotiation of the two certificates of deposit and from permitting withdrawal of funds from the accounts of Underwriters, Mortgage Co., Wilson, or Budwey in either of the defendant banks.

A temporary restraining order was issued on 28 March 1975, and after hearing on 7 April 1975 a preliminary injunction was issued containing the following:

> "A. Each and every one of the defendants, Insurance Designers Underwriters Group, Crown Mortgage Company, Rodney Budwey and Philip M. Wilson, from issuing, signing, endorsing or otherwise causing instructions to be is-

sued for the withdrawal of funds on deposit in the North Carolina National Bank, Winston-Salem, North Carolina, and First Virginia Bank of Annandale, Virginia, by means of any checks, sight drafts, letters of credit, bills or notes or other negotiable instruments.

"B. Each and every one of the defendants, Insurance Designers Underwriters Group, Crown Mortgage Company, Rodney Budwey and Philip M. Wilson, from negotiating, cashing or otherwise disposing of the savings certificates of deposit numbers 63138 and 63139 issued by the North Carolina National Bank of Winston-Salem, North Carolina.

"C. The defendant banks, North Carolina National Bank, Winston-Salem, North Carolina, and First Virginia Bank of Annandale, Virginia, from permitting the withdrawal of any funds on deposit in each of the respective banks in the names of Insurance Designers Underwriters Group, Crown Mortgage Company, Rodney Budwey and Philip M. Wilson and the honoring of any checks, sight drafts, letters of credit, bills or notes or any other negotiable instruments issued, signed, endorsed or otherwise entered against said accounts while making payment of the savings certificates of deposit numbers 63138 and 63139.

"D. The defendants John R. Macari, Shirley S. Macari and Centre Hill, Inc. from negotiating, cashing or otherwise disposing of the aforesaid savings certificates of deposit numbers 63138 and 63139 or any funds secured by same."

On 13 May 1975 judgment by default was entered against Underwriters, Mortgage Co., and Budwey in the sum of $232,000.00. All defendants were "permanently enjoined from negotiating, cashing or otherwise disposing of certificates of deposit numbers 63138 and 63139 issued by defendant North Carolina National Bank of Winston-Salem, North Carolina. . . " On 22 July 1975 judgment by default was entered against defendant Wilson.

On 23 December 1975 plaintiff filed a motion to modify the judgment heretofore entered, alleging that Underwriters, Mortgage Co., and Budwey had entered into a settlement agreement with plaintiff and:

"That as a part of that settlement agreement, the above-named defendants, in addition to three other parties who

were defendants in other lawsuits brought by plaintiff in other jurisdictions, would cause to be transferred to TIFCO, Inc. two negotiable certificates of deposit issued by the North Carolina National Bank of Winston-Salem, North Carolina, same being savings certificates of deposit Nos. 63138 in the sum of $115,000.00 and 63139 in the sum of $100,000.00, with such endorsements as are necessary either upon the certificates themselves or upon such other instruments as may be required by the aforesaid bank to effect the full and complete payment of the respective principal and interest thereon to TIFCO, Inc."

The motion prayed for a modification "to permit the assignment of the two certificates of deposit, Nos. 63138 and 63139, to Tifco, Inc. for presentation to NCNB for payment of the proceeds to Tifco, Inc., thereby finally adjudicating this lawsuit."

On 22 January 1976 Judge Crissman entered judgment providing:

"That the Judgments by Default Final entered herein on May 13, 1975, and July 22, 1975, be, and they are hereby affirmed in all respects except that the injunction heretofore entered is dissolved as to all defendants and the defendants Insurance Designers Underwriters Group, Inc., a/k/a Insurance Designers Underwriters Group Ltd., a/k/a Insurance Underwriters Group Ltd., Inc., Crown Mortgage Company, Inc., a/k/a Crown Mortgage Company, a/k/a Crown Mortgage Correspondents, Inc., and Rodney Budwey are no longer enjoined from causing the aforesaid certificates to be transferred to Tifco, Inc., *and the defendant North Carolina National Bank of Winston-Salem, North Carolina, be, and it is hereby ordered to make payment of the certificates of deposit numbers 63138 and 63139 to Tifco, Inc.*, or its agent." (Emphasis added.)

Defendant NCNB appealed.

Craige, Brawley, Liipfert & Ross, by C. Thomas Ross, for plaintiff.

Surratt & Early, by John R. Surratt, for defendant NCNB.

BROCK, Chief Judge.

North Carolina National Bank has only one interest in this lawsuit. That is to see that it pays the certificates of deposit

without leaving outstanding claims against them which could be enforced against the bank.

The pleadings do not seek an adjudication of ownership of the certificates of deposit nor of the obligation of NCNB to pay them to a particular party. Indeed the allegations in the motion to modify the previous judgments recognize the necessity of presenting endorsements as required by NCNB. This is not to say that NCNB has an unbridled right to require unnecessary endorsements or assignments, but in this case there is no evidence of what kind, or by whom, endorsements or assignments, if any, have been made. The judgment appealed from seems to assume that all necessary endorsements or assignments will be made and directs NCNB to pay plaintiff.

As pointed out, the pleadings do not seek an adjudication of ownership or right to proceeds of the certificates of deposit, and no evidence was offered upon the subject. The pleadings do not seek an adjudication of the obligation of NCNB to pay the proceeds of the certificates of deposit to any particular party, and no evidence was offered upon the subject. The motion for modification merely sought to lift the ban against negotiation of the certificates of deposit.

It seems clear that the relief granted by the judgment appealed from was different in kind from the relief sought. "A judgment by default shall not be different in kind from . . . that prayed for in the demand for judgment." G.S. 1A-1, Rule 54(c).

The judgment is clearly excessive in that it orders NCNB to pay, thereby denying to NCNB any rights the bank has as a payor under Chapter 25 of the General Statutes of North Carolina. It denies to NCNB the right to require presentment under G.S. 25-3-505. It denies to NCNB the rights to require proper endorsements or assignments under G.S. 25-3-507 or to refuse payment until Tifco establishes itself as holder in due course or holder for value as allowed under G.S. 25-3-603. It denies to NCNB any right to setoff against Tifco that the bank might have. Further, until Tifco establishes that it is a holder in due course of the certificates of deposit, it takes them subject to all valid claims to them on the part of any person, G.S. 25-3-306, and there has been no determination as to the existence or non-existence of other claims.

The trial judge had plenary authority to dissolve the injunction which prevented the negotiation, transfer, or payment of the certificates of deposit, thereby allowing the transfer to Tifco and payment by NCNB upon appropriate presentment. However, he was in error in summarily directing NCNB "to make payment of the certificates of deposit numbers 63138 and 63139 to Tifco, Inc., or its agent."

Insofar as the judgment appealed from orders NCNB to make payment of the certificates of deposit to Tifco, the same is reversed and the cause is remanded.

Reversed and remanded.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. DON CHANDLER

No. 764SC307

(Filed 15 September 1976)

1. **Criminal Law § 127— arrest of judgment — resisting two officers — different verdicts**

Defendant was not entitled to have judgment arrested on the ground that the jury could not legally find him guilty of resisting an officer when it found him not guilty of resisting a second officer since the jury's verdict in either case was not dependent upon its verdict in the other case.

2. **Criminal Law § 99— instructions to confine answer to question asked — no expression of opinion**

The trial judge did not express an opinion when, on three separate occasions during the trial, he instructed defendant and his witness to confine their response to the question asked.

3. **Criminal Law § 86— admission of prior crimes — opportunity to explain**

Defendant failed to show he was prejudiced by the court's refusal to allow defendant to explain fully the prior convictions which he admitted on cross-examination.

4. **Criminal Law §§ 102, 128— jury argument by district attorney — motion for mistrial**

In a prosecution for resisting a law officer, the trial court did not err in the denial of defendant's motion for a mistrial because of the district attorney's jury argument that "the defendant was in possession of property which he, the defendant, must have or in

some way stolen" where the court instructed the jury to disregard the district attorney's remark about stolen goods.

APPEAL by defendant from *James, Judge.* Judgment entered 29 October 1975 in Superior Court, ONSLOW County. Heard in Court of Appeals 26 August 1976.

Criminal prosecution on a warrant, proper in form, charging that defendant Don Chandler "did unlawfully, wilfully, . . . resist Benny Simms [sic], a public officer holding the office of Deputy Sheriff of Onslow County, N. C. by kicking officer 2 times in the stomach. At the time, such officer was attempting to discharge a duty of his office, to wit: arrest Don Chandler for resisting arrest."

The record before us discloses that defendant was also charged with resisting Deputy Sheriff Sammy Jarman in his attempt to serve a warrant to search for stolen goods. Defendant was convicted in district court on both charges of resisting an officer. He appealed both cases to superior court where they were consolidated for trial de novo.

Upon the defendant's pleas of not guilty in both cases, the State offered evidence tending to show the following:

On 23 June 1975 Sims and Jarman, Deputy Sheriffs, went to defendant's mobile home at 11:30 p.m. to serve a search warrant to search for stolen property. Accompanying the officers was one Youngblood, the owner of the alleged stolen property. Defendant generally cooperated with the officer until Jarman requested that Youngblood be allowed to come out to a utility shed in defendant's backyard to identify what Jarman believed to be some of the stolen property. To this request defendant replied. "Hell, no; Youngblood's not looking at anything I have." Jarman informed the defendant that notwithstanding his objection Youngblood must be allowed to examine the property. State ABC Officer Robert Warlick and SBI Agent Steve Woodall, who had just arrived on the scene, brought Youngblood out to the utility shed.

When Jarman opened the door to the shed, defendant pushed him back and slammed the door so Youngblood could not see inside. Jarman said, "You're under arrest for interfering with an officer," and again opened the door, but defendant again pushed him back and closed the door. Jarman struck at defendant with his blackjack but missed. Defendant then went into a

"karate stance." Sims then attempted to handcuff defendant but when he approached him, defendant kicked Sims twice in the stomach and chest. Jarman then hit defendant with his blackjack and the two officers attempted to handcuff him, but he broke away and ran toward his trailer vowing to get his gun and kill them. Sims pursued and caught defendant on the front porch where they struggled until Jarman came to Sims' aid by hitting defendant with his blackjack. The officers then subdued and handcuffed the defendant.

Defendant offered evidence tending to show the following:

When Jarman requested that Youngblood examine the property, he objected because the hour was late and he had work to perform early the next morning. He also objected because Youngblood was not a public officer and he felt that the search warrant did not give a private cittizen the authority to come onto his property. He did inform the officers, however, that he was willing for them to take the property with them.

When Jarman opened the door to the shed to let Youngblood inside, he closed it, and then Jarman struck him on the head with his blackjack, but at no time did Jarman tell him that he was under arrest. Defendant's wife placed herself between defendant and Jarman and Jarman knocked her to the ground. Defendant picked her up, and then Sims grabbed his arm and swung him around. Jarman struck him again with his blackjack, but defendant did not fight back. He did say that he would get his gun and run them off his property, even though he knew he had no gun. He ran around to the front of the mobile home where he collided with Sims. Jarman then came up and struck him over the eye with his blackjack resulting in a cut that required twelve stitches.

The jury acquitted the defendant of the charge of resisting Jarman in his attempt to serve a search warrant, but convicted him of the charge of resisting Sims. From a judgment imposing a jail sentence of six months, defendant appealed.

Attorney General Edmisten, by Assistant Attorney Guy A. Hamlin for the State.

Turner & Harrison, by Fred W. Harrison for defendant appellant.

HEDRICK, Judge.

[1] Defendant first argues that the judgment appealed from should be arrested because the verdicts on the two charges of resisting an officer are inconsistent. He argues that since the jury found him not guilty of resisting Officer Jarman, it could not legally find him guilty of resisting Officer Sims. The verdict of not guilty in the case of resisting Officer Jarman is not such a fatal defect appearing on the face of the record as to require that the judgment be arrested in the case of resisting Officer Sims. Under the factual situation here presented, the jury's verdict in either case was not dependent upon its verdict in the other case. Defendant's motion to arrest judgment is denied.

[2] On three separate occasions during the trial the court instructed the defendant and his witness to confine their response to the question asked. This is the basis for defendant's exceptions 4, 8, and 14, upon which he bases his second assignment of error. We have examined each and find the court correctly and properly instructed the witness with respect to his or her testimony. The court did not violate G.S. 1-180, as defendant contends, and express an opinion as to the evidence. This assignment of error has no merit.

On cross-examination defendant testified that he had been convicted of felonious assault on a police officer, attempted maiming and unlawful wounding, and petty larceny of an auto. On cross-examination he was allowed to testify that he pled guilty to the felonious assault because he had worked a deal. On redirect examination with respect to these convictions the record reveals the following:

> "Q. The instance that the Solicitor—District Attorney —has asked you about where you were convicted of unlawful wounding, what happened in that case?
>
> COURT: Objection sustained.
>
> EXCEPTION No. 9
>
> Q. Did you enter a plea of guilty or were you convicted by the Court?
>
> A. I entered a plea of guilty, sir. A bullet richocheted and hit a gentleman and I . . .
>
> COURT: Sustained. You have answered the question.

EXCEPTION No. 10

Q. Did you fire a weapon at anyone?

A. No, sir.

COURT: Sustained.

EXCEPTION No. 11

Q. Now the occasion that the District Attorney has questioned you about, he said auto larceny, what were you convicted of or plead guilty to?

A. I pleaded guilty to being in the car because you don't know about them things . . . .

COURT: Sustained. You have answered the question.

EXCEPTION No. 12

Q. Did you know at the time that you were in the car that it was stolen?

A. No, sir.

Q. After talking with the District Attorney, you entered a plea by your lawyer?

A. Yes, sir.

Q. That was in Virginia?

A. Yes, sir.

Q. Now the other charge which the Solicitor asked you about, I believe Felonious Assault, when did that occur; do you recall the date? I believe you said a police officer was involved?

COURT: The question, I thought, was brought up that that was ten years ago, '65, wasn't it?

ANDREWS: That was in '65.

HARRISON: I don't recall if that was the one or not, Your Honor.

A. If that's the one, I pleaded guilty to it because there was a bunch of gentlemen there; and the lawyer said . . .

COURT: Sustained. Gentlemen, I'm not permitting either State or the defendant to go into long explanations

of the offenses. It's right to ask about what they were; but the circumstances of each case is not material here.

EXCEPTION No. 13

Q. I'll ask you if you entered a plea of guilty to that or if you were convicted by the Court?

A. I pleaded guilty to it, sir."

[3] In his third assignment of error, based upon exceptions 9 through 13, defendant contends that the court erred in not allowing him to explain the prior convictions he admitted on cross-examination. While a witness is entitled to explain on cross-examination or on redirect examination any convictions he has admitted, Stansbury, N. C. Evidence 2d, § 112, the trial court is allowed considerable discretion in limiting such explanations. *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487 (1970); *State v. White,* 271 N.C. 391, 156 S.E. 2d 721 (1967).

In the present case we find no abuse of discretion on the part of the trial court in its rulings challenged by these exceptions. We do not conceive how the defendant might have benefited by being allowed to further pursue the matter. Defendant has failed to show he was prejudiced in any way by the court's rulings. This assignment of error is not sustained.

Based upon several exceptions the defendant contends that the court in its charge to the jury expressed an opinion on the evidence in violation of G.S. 1-180. We have carefully examined each exception upon which this assignment of error is based and find them to be without merit. When the charge is considered contextually as a whole, it is, in our opinion, free from prejudicial error.

[4] Finally defendant argues the court erred in denying defendant's motion "that the verdict of the jury be set aside and that a mistrial be declared." The record indicates that defendant based his motion on the statement of the district attorney in his argument to the jury "that the defendant was in possession of property which he, the defendant, must have or in some way stolen."

This assignment of error has no merit. Upon objection, and at the request of the defendant, the court instructed the jury to disregard the remarks of the district attorney with respect to the stolen goods, for the defendant could have come into pos-

session of the goods lawfully. We hold the court properly instructed the jury with respect to the improper argument of the district attorney.

We hold the defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. WILLIAM EDWARD CAMPBELL

No. 7612SC318

(Filed 15 September 1976)

1. **Arrest and Bail § 3— warrantless arrest — reasonable ground to believe felony committed**

   Defendant's warrantless arrest was lawful where the arresting officer had reasonable grounds to believe that defendant had been involved in the commission of a felony based on information given to the officer by a person who, to the officer's knowledge, had been arrested and charged with various breakings and enterings.

2. **Criminal Law § 75— confession made after warrantless arrest — admissibility**

   Defendant's confession made after his warrantless arrest was properly admitted into evidence where there was ample evidence on *voir dire* to support the trial court's conclusion that the confession was made freely, voluntarily, understandingly, and without promise of hope or reward.

3. **Criminal Law § 96— veracity of person questioned — question and answer properly stricken**

   The trial court did not err in striking an exchange between defense counsel and a witness on cross-examination which required the witness to comment on the veracity of a named person.

APPEAL by defendant from *Gavin, Judge.* Judgment entered 2 December 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 26 August 1976.

Defendant was tried and convicted of (1) second-degree burglary and (2) felonious larceny.

The State's evidence tends to show the following: Defendant and a State's witness, Louis Miller, broke and entered an

apartment located at 1143-A Tammy Street and from that apartment carried away, without the permission of the occupant, one portable color television valued at approximately $850.00.

Miller, who had pleaded guilty, was called as a witness for the State and, in summary, testified as follows:

He and defendant had participated in a number of other "B and E's." On the night of this particular crime defendant picked him up at his home and the pair rode around looking for an apartment to burglarize. They entered the apartment on Tammy Street by forcing a window open, then took the television from a bedroom, and hid it in some woods. Later they sold it to Marshall Byrd.

Deputy Sheriff D. M. Capps testified that on the 19th of February, 1975, he had the occasion to arrest the defendant for an offense not related to the present charge. The arrest was made without a warrant and was based, among other things, on information received from one James Madenna, who was under arrest for breaking, entering and larceny on some other unrelated charges and on information that defendant was moving out of his residence. Officer Capps testified that he gave the defendant the *Miranda* warnings and that the defendant signed a written statement acknowledging that he had been fully informed of those rights and that he waived these rights during the interrogation. The defendant, within an hour of his arrest, made a statement to Officer Capps admitting the break-in at the apartment on Tammy Street and the theft of the television. Defendant also had Capps drive around to other places which the defendant pointed out as places he said he had burglarized. Defendant told the deputy of at least one item that had been stolen from each place and, upon investigation, Officer Capps discovered that these places had been burglarized and that the defendant had some knowledge of what had been stolen from each place.

Marshall Byrd testified that he bought the stolen television from Louis Miller, who was accompanied by defendant, for $135.00. He testified that the defendant and Louis Miller came to his house and asked him to take them to pick up the set. Byrd, according to his testimony, drove the pair to a mobile home on Tammy Street and waited in the car while Miller and the defendant went to retrieve the set from the woods. They put the television in Byrd's car and Byrd drove them to the

defendant's trailer where the television was tested. The three then reloaded the set into Byrd's vehicle and took it to Byrd's house for approval of the purchase by Byrd's wife. Byrd then purchased the set.

Defendant Campbell testified that although he confessed to Officer Capps that he had burglarized 1143-A Tammy Street, he confessed to that particular burglary and pointed out to Officer Capps other places he had allegedly burglarized only because the deputy had promised to release defendant's girl friend, Laura Melvin, who had been taken into custody when defendant was arrested at his trailer, if he would cooperate with the deputy and confess. He said he did not know that the television Miller sold Byrd, in his presence, was stolen until two or three days after the sale. The defendant also claimed that all of the places he pointed out to Deputy Capps as having been burglarized by him were places that Louis Miller had told him that Miller had burglarized.

Laura Melvin, the defendant's girl friend, testified that at the time of the alleged burglary and of the arrest of the defendant on February 19, 1975, she was living with the defendant. She said that the deputies arrested her at the time of the defendant's arrest for being an accessory after the fact, though she was never officially charged with any crime. She testified that she was given the *Miranda* warnings and was taken to the Sheriff's Department. At the Sheriff's Department she overheard Capps tell the defendant that he would release her if the defendant would confess to the crimes.

The jury returned a verdict of guilty on both the charges for second-degree burglary and felonious larceny. From a judgment of imprisonment, the defendant appealed.

Attorney General Edmisten, by Associate Attorney Cynthia Jean Zeliff, for the State.

William R. Davis, for defendant appellant.

VAUGHN, Judge.

On appeal the defendant contends that his arrest by Deputy Capps was unlawful because it was not made in compliance with the provisions of G.S. § 15-41(2) (then in effect) and that as a result of this illegal arrest his confession, which was given shortly thereafter, should be inadmissible because it was tainted

by the illegal arrest. We do not pass on whether the question was properly raised at trial but will dispose of it on the merits.

[1] G.S. § 15-41(2) in pertinent part provided: "A peace officer may without a warrant arrest a person . . . [w]hen the officer has reasonable ground to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody." An officer need not show that a felony has actually been committed. It is only necessary for the officer to have reasonable ground to believe that such an offense has been committed. *State v. Shore,* 285 N.C. 328, 204 S.E. 2d 682 (1974). A warrantless arrest is based upon probable cause if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is a felon. *McCray v. Illinois,* 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed. 2d 62 (1967); *State v. Shore, supra.* We hold that the evidence supports the conclusion that the officer had reasonable grounds to believe that the defendant had been involved in the commission of a felony based on information given to the officer by Madenna, who, to the officer's knowledge, had been arrested and charged with various breakings and enterings.

[2] Although we have no difficulty in concluding that the arrest was lawful, even an unlawful arrest does not, standing alone, make a subsequent confession unlawful. The question is whether, under all the circumstances, the confession is voluntary. The judge, in this case, conducted a *voir dire* hearing on the voluntariness of the defendant's confession and his findings were that the confession was intelligently, knowingly and voluntarily made by the defendant after he had been fully advised of his constitutional rights and had waived those rights. The judge found further that the defendant was not under the influence of drugs or alcohol and was physically and mentally competent. It was further found that Officer Capps made no offer of hope, reward, or inducement nor did he employ threats, suggested violence or show of violence to persuade or induce the defendant to make a statement. Moreover on *voir dire* the only reason suggested by defendant for making the confession was that he had been led to believe that if he admitted his role in the crimes his girl friend would be released. Even if the judge had believed that testimony it would not compel a finding that the confession was involuntary. Where the trial court finds upon *voir dire* from conflicting evidence that the confession was

voluntarily and freely made after defendant had been advised of his rights, the findings, if supported by evidence, are binding on appeal. *State v. Clyburn,* 273 N.C. 284, 159 S.E. 2d 868 (1968).

[3] The defendant further assigns as error that the trial court commented on the truthfulness of a witness for the State by striking the defense counsel's question and the witness's answer to the question on cross-examination. The exchange in question is the following:

> "Q. So if Alexander Miller were to say it was six weeks later, he'd be lying, wouldn't he?
>
> A. Yes, sir.
>
> THE COURT: Well, members of the jury, do not consider that statement; I'm not going to let anybody call a witness or anyone else a liar in my court. It's for the jury to determine the credibility of a witness."

The limits of legitimate cross-examination are largely within the discretion of the trial judge, and his ruling thereon will not be held error in absence of showing that the verdict was improperly influenced thereby. *State v. McPherson,* 276 N.C. 482, 172 S.E. 2d 50 (1970). The trial court was correct in striking the question and answer and in instructing the jury to disregard the exchange because the question and answer were highly improper.

The defendant next contends that the trial judge erred when he encouraged the defendant to make a statement he had indicated earlier that he wanted to make. When the trial court, after a *voir dire* examination of the defendant to determine the competency of the defendant's explanation of his prior testimony, allowed the defendant to make such an explanation in the presence of the jury, the court committed no error. That the judge reminded the defendant of what he had said he wanted to explain did not constitute error.

We have examined the 12th assignment of error wherein defendant brings forward an exception to the judge's instruction on the effect of a variance between the date of the offense as alleged in the indictment and as shown by some of the testimony. When that instruction is considered in the light of all of the evidence at trial, we conclude that it could not have affected the verdict of the jury.

We have also considered the assignments of error not discussed in this opinion. We conclude that defendant had a fair trial that was free of error so prejudicial as to require a new trial.

No error.

Judges MORRIS and CLARK concur.

JOHNNY ALFORD, EMPLOYEE-PLAINTIFF, APPELLANT v. VICTORY CAB COMPANY, INC., EMPLOYER-DEFENDANT & AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER-DEFENDANT, APPELLEES

No. 7626IC345

(Filed 15 September 1976)

Master and Servant § 50— workmen's compensation — taxicab driver — independent contractor

A taxicab driver was an independent contractor rather than an employee of the taxicab company where he rented a taxicab from the company for a flat fee of $15.00 for a twenty-four hour period and kept all the fares and tips he earned, the company had no supervision or control over the manner the driver chose to operate the taxicab, the driver had complete control over his work schedule while he used the taxicab, the driver could disregard the company's radio dispatcher, and the driver could use the taxicab for his own purposes during the time it was rented.

APPEAL by plaintiff from order of North Carolina Industrial Commission entered 19 December 1975. Heard in the Court of Appeals 2 September 1976.

This workmen's compensation action arose from a 24 September 1971 shooting of Alford, a taxicab driver. A dispatcher for Victory Cab Company, Inc. (Victory) quarreled with and shot Alford in the mistaken belief that Alford had not paid money owed to Victory. Alford was permanently paralyzed as a result of his injuries.

Alford's claim was originally heard by Deputy Commissioner C. A. Dandelake. Alford attempted to show that Victory was a common carrier engaged in the transportation of passengers for hire and that Victory exercised enough control over his

activities to make him an employee. Victory presented evidence to show that it was in the business of leasing taxicabs to drivers, such as Alford, who were independent contractors. Evidence presented by the parties conflicts very little.

Much of the relationship between Alford and Victory was controlled by the City of Charlotte Municipal Code, Chapter 19, which was placed in evidence. Pursuant to the Code, Victory had obtained 50 certificates of public convenience and necessity licensing it to operate 50 taxicabs in Charlotte. Such certificates were only available to cab owners, and without these certificates an owner could not operate cabs. In order to retain a certificate a cab owner had to comply with statutory fare schedules, give fare receipts bearing its name, provide standard safety equipment, paint all its cabs the same distinct color, and identify them by painting its name and phone number on the sides and rear of the cabs. Further, the owner had to provide liability insurance, post a security bond, or deposit securities to protect its passengers and the public in case of accident. The Code also permitted the owner to enter into one of several employment relationships with its drivers. The owner could pay a fixed wage or commission to its drivers, or it could enter into a lease agreement whereby the driver paid the owner a fixed amount for the use of the cab for one day and then kept all or a portion of the fares and tips earned that day. The lessee was designated an independent contractor under this lease arrangement.

The Code also regulated the conduct of taxicab drivers. It required them to be in good health, of good character and without a felony record. No person could drive a taxicab without a permit from the City, and a permit was revocable for violation of either the criminal statutes or the City Code pertaining to taxicabs. The Code also regulated much of the driver's conduct in operating his cab. For example, it forbade him to smoke, to refuse the reasonable requests of his passengers, to solicit passengers, to cruise in search of passengers, to carry too many passengers, or to accept additional passengers once his cab was occupied.

Victory also operated a terminal garage where it serviced its own cabs and sold gasoline through a sister corporation. At the time of the accident, Victory actually operated only 20 taxicabs because it was unable to find drivers for the rest. All of Victory's drivers were compensated in the same manner. They

paid $15 rental to Victory each day in exchange for a taxicab which they could use for 24 hours. The drivers were allowed to keep all of the fares and tips they collected, less the cost of gasoline they purchased. This arrangement was usually renewed each day, but Victory was not obligated to renew it with any driver. A driver who violated the City Code, broke Victory's rules, or otherwise failed to satisfy the company would not be given a taxi. Moreover, a driver who gave poor service was likely to be given an older and less desirable cab.

Most of Victory's drivers were regulars who worked six or seven days a week, and as much as 20 hours a day. Victory kept a list of drivers and the cabs they drove. However, Victory did not carry them on its payroll, or withhold income tax or social security deductions. Pursuant to the City Code, Victory required its drivers to wear uniforms, be physically fit and refrain from immoral or illegal conduct.

Victory also provided a radio dispatcher who would send drivers to pick up nearby passengers. These calls were allocated among the drivers who had some freedom to refuse the dispatcher's instructions. Refusals were ordinary but not too frequent. Alford, for example, only refused instructions to go to a particular dangerous neighborhood.

Robert A. Isenhour, president of Victory, testified that once the company received its $15, it did not care what the driver did. He also testified that he wanted the drivers to make money for the good of the company, that he held the company out to the public as a cab company, that he permitted drivers to fall behind in their rent without taking their cabs, that the company held business and safety meetings for its drivers and, in substance, supervised their conduct and compliance with the City Code. Isenhour further testified that he could not fire a driver, but he also said he could let a driver go or otherwise "work out a way to get rid of" an unsatisfactory driver. Isenhour testified that he considered the contracts with the drivers to be leases. He also referred to them as a "pay system," and again as a "payroll system," indicating that he thought of them as a method whereby the company compensated the drivers. He spoke of times when the company "gave [drivers] a day off."

Johnny Alford, plaintiff, testified that he was an experienced cab driver who knew how to do a good job. He further testified that Victory exercised considerable control over his

work as a cabbie in that the company assigned him his cab, supervised his compliance with company rules and city ordinances, dispatched him on many of his calls, and effectively required him to work long hours in order to protect his privilege to use a desirable cab.

On this evidence, Deputy Commissioner Dandelake found that Alford rented a taxicab from Victory Cab Company, Inc., for $15 a day, that he kept all his fares and tips, and that he was not controlled by the dispatcher. The plaintiff excepted to the finding that the dispatcher did not control Alford. The Deputy Commissioner further concluded that Alford was an independent contractor instead of an employee since Victory had no right to control him. The Deputy Commissioner concluded that the Industrial Commission lacked jurisdiction to award workmen's compensation and, accordingly, dismissed Alford's claim. Plaintiff excepted to these conclusions and appealed to the Full Commission. The Commission affirmed the order of the Deputy Commissioner, and from this, plaintiff appeals.

Barry M. Storick for plaintiff appellant.

Hedrick, Parham, Helms, Kellam & Feerick, by Phillip R. Hedrick and Edward L. Eatman, Jr., for defendant appellees.

ARNOLD, Judge.

This appeal presents the question of whether appellant was an employee or an independent contractor. Appellant contends that he was not an independent contractor. He supports his argument by several cases from other jurisdictions. Our research reveals additional authority outside this State in support of the contention that a taxicab driver who rents his cab and keeps his fares and tips as compensation is an employee. *Naseef v. Cord, Inc.*, 48 N.J. 317, 225 A. 2d 343 (1966); *Hannigan v. Goldfarb*, 53 N.J. Super. 190, 147 A. 2d 56 (1958); *Morgan Cab Co. v. Industrial Comm'n*, 60 Ill. 2d 92, 324 N.E. 2d 425 (1975); *Golosh v. Cherokee Cab Co.*, 226 Ga. 636, 176 S.E. 2d 925 (1970); *White Top & Safeway Cab Co. v. Wright*, 171 So. 2d 510 (Miss. 1965). *See, Salt Lake Transportation Co. v. Bd. of Review*, 5 Utah 2d 87, 296 P. 2d 983 (1956). *Contra, Coviello v. Indus. Comm'n of Ohio*, 129 Ohio St. 589, 196 N.E. 661 (1935).

Of the few states which have considered the employment status of a claimant on the facts as presented here, a majority

appear to consider the claimant an employee for purposes of workmen's compensation. In determining whether the claimant is an employee entitled to compensation many of these cases turn on the nature of the claimant's work in relation to the business for which the work is being done. *(See,* Larson, Workmen's Compensation, § 43.42 et seq. (1972 ed.).)

The test we must employ to determine appellant's employment status turns on the amount of control exercised over the claimant. As stated in *Little v. Poole,* 11 N.C. App. 597, 601, 182 S.E. 2d 206, 209 (1971) :

> "The test for determining whether a relationship between parties is that of employer and employee, or that of employer and independent contractor, is whether the party for whom the work is being done has the right to control the worker with respect to the manner or method of doing work, as distinguished from the right merely to require certain definite results conforming to the contract."

Findings of fact support the Commissioners' conclusion that appellant was an independent contractor, because the right of control did not rest in Victory. Claimant rented a taxicab from Victory for a twenty-four hour period for a flat fee of $15, and Victory had no supervision or control over the manner or method claimant chose to operate that cab. Claimant had complete control over his work schedule while he used the cab. He could disregard the radio dispatcher, use the cab for his own purposes during the time it was rented, and he kept all the fares and tips he earned. *Askew v. Tire Co.,* 264 N.C. 168, 141 S.E. 2d 280 (1965) ; *Hayes v. Elon College,* 224 N.C. 111, 29 S.E. 2d 137 (1944) ; *Millard v. Hoffman, Butler & Associates,* 29 N.C. App. 327, 224 S.E. 2d 237 (1976).

The opinion and award of the Industrial Commission is

Affirmed.

Judges BRITT and MORRIS concur.

BARBARA JEAN FOY v. THOMAS EDWARD BREMSON, GROVER C. BISSETTE AND LESTER GODWIN

No. 767SC330

(Filed 15 September 1976)

1. **Automobiles § 90— definition of negligence — jury instructions proper**

In an action for damages sustained when plaintiff was struck by an automobile operated by one defendant at night while plaintiff was helping the other defendants try to get a farm truck out of a ditch, the trial court's instruction from which the jury could have only understood that "negligence" had the same meaning whether applied to plaintiff's conduct or to a defendant's conduct was proper.

2. **Automobiles § 72— sudden emergency — plaintiff's negligence as cause — failure to instruct proper**

In an action to recover damages sustained by plaintiff when she was struck by defendant's automobile, the trial court did not err in failing to instruct the jury on the doctrine of sudden emergency, since if, as the jury found, plaintiff was negligent, it was that very negligence which contributed to the creation of any emergency she thereafter faced.

3. **Automobiles § 90— failure of plaintiff to move to safety — jury instructions proper**

In an action arising from an automobile accident, the trial judge fairly declared and explained the law arising on the evidence, which he had just recapitulated, tending to show that plaintiff placed herself in a position of peril and failed to remove herself to a place of safety.

4. **Automobiles § 90— jury instructions — use of "per se" — no error**

The trial court's use of the words "per se" in instructing on contributory negligence did not amount to prejudicial error.

APPEAL by plaintiff from *Tillery, Judge.* Judgment entered 29 September 1975 in Superior Court, WILSON County. Heard in the Court of Appeals 1 September 1976.

Plaintiff was struck by an automobile operated by defendant Bremson at night while plaintiff was in the highway helping the other defendants try to get a farm truck out of the ditch. The case has been here on another appeal reported in 20 N.C. App. 440, 201 S.E. 2d 708. The Supreme Court granted *certiorari* and its decision is reported as *Foy v. Bremson,* 286 N.C. 108, 209 S.E. 2d 439. A new trial was ordered. When the case was retried the jury found that all parties were negligent. Plaintiff appeals from the determination that she was guilty

of contributory negligence. A general understanding of the evidence at trial may be gained by reading the reports of the case on the earlier appeal.

Narron, Holdford, Babb & Harrison, by William H. Holdford, for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay, by Robert M. Clay, for defendant appellee Bremson.

Battle, Winslow, Scott & Wiley, P.A., by Robert L. Spencer, for defendant appellees Bissette and Godwin.

VAUGHN, Judge.

[1] In assignment of error number five, plaintiff argues that the judge erred when, as he reached the issues of contributory negligence, he told the jury:

> "The test of what is negligence as I have already defined it and explained it is the same for the plaintiff as it would have been and was for each of the defendants."

Earlier in the charge, the judge had told the jury that he was going to explain what was meant by "burden of proof," "negligence" and "proximate cause" but that he was not going to repeat the definitions every time they got to one of the other issues. When he gave the quoted instruction to which exception was taken, the jury could have only understood that "negligence" had the same meaning whether applied to plaintiff's conduct or a defendant's conduct. The assignment of error is without merit.

[2] In her seventh assignment of error plaintiff contends that the judge erred in that he did not instruct the jury on the "doctrine of sudden emergency" as it applied to plaintiff's actions.

A description of the scene of the accident is set out in the opinion of the Supreme Court on the first appeal. In summary, the following situation existed at 11:30 p.m. on a rural section of a public highway: There was a grain truck on each side of the highway. One of the trucks was stuck, and the other was being used in an attempt to get it free. The two trucks were connected by a log chain which extended across the highway. The highway was straight from that point for about one mile north. Defend-

ant Bremson was driving south toward the trucks. Plaintiff was in the highway just south of the two grain trucks that were connected by the log chain extending across the highway. She had been on the scene for about an hour helping in an attempt to free the truck that was stuck. Shortly before the collision, she had been holding a flashlight for one of the men while he connected the chain to one of the trucks. She had started to walk south on her right hand side of the highway when she heard some of the others yell, "He's not going to stop." She turned around and faced north. At almost the same time the grain trucks and connecting log chain were being struck by the Bremson car. The Bremson car then struck her.

If, as the jury found, plaintiff was negligent, it was that very negligence which contributed to the creation of any emergency she thereafter faced. The evidence tending to show negligence on plaintiff's part relates to her indifference to the perils existing before the Bremson car came through the barricade, and thus the "doctrine of sudden emergency" does not apply to her subsequent conduct. Reasonable conduct under the circumstances existing as the Bremson car came through the barricade could not insulate her from her earlier neglect.

We next consider plaintiff's sixth assignment of error. Rule 10(c) of the Rules of Appellate Procedure requires that each assignment of error state plainly the basis upon which error is assigned. The basis of the sixth assignment of error is stated in the record as follows:

> "The Court's instructions to the jury that Plaintiff was negligent if she placed herself in a position of peril when she could have found safety or failed to remove herself to a position of safety from a place where she was in danger. The Court not only misstated the law, it failed to apply the law to the evidence as required by Rule 51 of the N. C. Rules of Civil Procedure."

The exceptions listed in support of the assignment of error are Nos. 9 and 11. Exception No. 9 is to the following part of the charge:

> "(In this case each of the defendants contends and the plaintiff denies that the plaintiff was negligent in one or more of the following respects:
>
> First, in that she placed herself in a position of peril when she could have found safety. Second, that she failed

to remove herself to a position of safety from a place where she was in danger. Third, that she failed to keep a proper lookout for other persons using the highway. And, fourth, that she failed to yield the right of way to the vehicle of Mr. Bremson by walking on the wrong side of the road.

Now, with respect to the first of those, that is having placed herself in a position of peril when she could have remained or found herself a position of safety, the Court instructs you that if you find from the evidence and by its greater weight, the burden of proof being on the defendants to so satisfy you, that Miss Foy went out on that road on that night and stayed there when a reasonable and prudent person by the exercise of due caution knew or should have known that it was a dangerous place to be, then this would constitute and would not have done so . . . a reasonable person would not have done it under the circumstances then and there existing, then this would constitute negligence. If Miss Foy was on the road in a position of danger and failed to go to a position of safety when she had an opportunity to do so, when a reasonably careful and prudent person under the same circumstances then existing would have sought a position of safety, then this would constitute negligence.)"

In her brief, in support of this assignment of error, plaintiff argues that the court "failed to fully charge the applicable legal principles and apply the law to the evidence." Rule 10(b)(2) of the Rules of Appellate Procedure requires that an exception to the failure to give particular instructions shall identify the omitted instruction by setting out its substance immediately following the instruction given.

[3] We hold that in this instruction, the judge fairly declared and explained the law arising on the evidence, which he had just recapitulated, tending to show that plaintiff placed herself in a position of peril and failed to remove herself to a place of safety.

The court thereafter proceeded in portions of the charge, to which no exceptions were taken, to explain the law arising on the evidence tending to show that plaintiff failed to yield the right-of-way to defendant Bremson and her failure to keep a

proper lookout. In the instruction on failure to keep a proper lookout the court instructed the jury as follows:

> "The Court instructs you that a pedestrian who is walking upon a highway is required to keep a reasonable lookout, that in the same lookout as any reasonable, careful and prudent person would keep under all the circumstances then existing. Miss Foy's duty on this night was not only to look, but to see what she should have seen. She must be reasonable vigilent and anticipate the use of the highway by others and a breach of this duty or a violation of it is negligence."

Shortly thereafter the court gave the following instruction which is the subject of exception No. 11 brought forward in assignment of error No. 6.

> "(Finally, as to this issue of the contributory negligence of the plaintiff, the Court instructs you that if the defendants or either of them, have proved by the greater weight of the evidence, at the time of the collision, the plaintiff, Miss Foy was negligent in any one or more of the following respects, either in that she went into a place of danger when a person of reasonable care and prudence would not have done so, or that she failed to leave a place of danger and go to a place of safety when a reasonably, careful and prudent person would have done so, or that she failed to yield the right of way to vehicular traffic as a pedestrian when a reasonable, careful and prudent person would have done so, or that she failed to keep a proper lookout, which would be negligence per se if the defendants have proved either of these things by the greater weight of the evidence and if it has further been proved by the greater weight of the evidence that such negligence on her part was a proximate cause of her own injury, then it would be your duty to answer this issue, yes, in favor of the defendants.)"

[4] Plaintiff's objection to the foregoing is that the judge used the words "per se." It was the court's only use of or reference to the phrase. We see no error prejudicial to plaintiff in its use. At worst, it amounts to a superfluity of words. The judge, in effect, said that negligence is negligence. In certain instances statutes set a standard of care and a violation of such a statute is negligence without regard to the standard of a "rea-

sonably prudent person." In the absence of a safety statute the jury must judge conduct by the standard of a "reasonably prudent person." A violation of that standard is also negligence.

Plaintiff also contends that, in one instance, the court erred in its summary of plaintiff's testimony. Plaintiff noted an exception. Thereafter the court told the jury that the inadvertence had been called to his attention. He then restated the testimony according to his recollection and admonished the jurors to rely on their own recollection of the evidence. There is no exception to the restatement of that part of the testimony, and there is nothing in the record to indicate that the correction was not given exactly as requested. At any rate, it appears to be a fair summary of the witness's testimony. The assignment of error is overruled.

We conclude that the case was fairly tried without prejudicial error.

No error.

Judges MORRIS and CLARK concur.

DUILIO GIANNITRAPANI v. DUKE UNIVERSITY, TERRY SANFORD, PRESIDENT OF DUKE UNIVERSITY, EDWIN L. JONES, JR., AMOS R. KEARNS, DR. JOHN KNOWLES, JOHN A. McMAHON, CLIFFORD W. PERRY, MARY SEMANS, WALTER M. UPCHURCH, JR., FRED VON CANON, DR. JACK W. BONNER III, KEITH H. BRODIE, M.D., DOYLE GENTRY, RUFUS H. POWELL, EDWARD W. BUSSE, M.D., CHARLES W. NEVILLE, JR., M.D., WILLIAM G. ANLYAN, FREDERICK CLEAVELAND

No. 7628SC283

(Filed 15 September 1976)

Appeal and Error § 14— timely filing and service of appeal notice — jurisdictional matters

The provisions of G.S. 1-279 and Appellate Rule 3 require both filing and service of notice of appeal within ten days after entry of judgment, and the trial court lacks authority to permit the notice of appeal to be served after the expiration of ten days following the entry of judgment; furthermore, timely filing and service of notice of appeal are jurisdictional matters requiring dismissal of the appeal for noncompliance.

APPEAL by plaintiff from *Griffin, Judge.* Judgment entered 11 February 1976 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 24 August 1976.

On 17 November 1975, following a hearing on a motion by plaintiff for a preliminary injunction and a motion by defendants to dismiss the action pursuant to G.S. 1A-1, Rule 12(b)(6), the trial court entered judgment denying plaintiff's motion and allowing defendants' motion, dismissing the action.

On 25 November 1975 plaintiff *pro se* filed a notice of appeal to the judgment aforesaid and the trial court made appropriate appeal entries.

By motion pursuant to Rule 25 of the N. C. Rules of Appellate Procedure, dated 21 January 1976, defendants asked the trial court to dismiss the purported appeal for the reason that the notice of appeal which was not given in open court was not served on defendants as required by G.S. 1-279 and Appellate Rules 3 and 26.

On 11 February 1976, following a hearing on defendants' motion to dismiss the appeal, the trial court entered judgment (1) finding facts as contended by defendants; (2) concluding that the requirement that notice of appeal be served upon all parties within ten days from the entry of judgment is jurisdictional and failure to comply requires dismissal of the appeal, and that the court lacks discretion to permit notice of appeal to be served on defendants after the expiration of ten days following entry of the judgment; and (3) dismissing the appeal. Plaintiff appealed.

Chambers, Stein, Ferguson & Becton, by J. LeVonne Chambers and Louis L. Lesesne, Jr., for plaintiff appellant.

Powe, Porter, Alphin & Whichard, P.A., by E. K. Powe, for defendant appellees.

BRITT, Judge.

At the outset we point out that plaintiff's present counsel did not represent him at the time notice of appeal was given. The record discloses that plaintiff discharged his trial counsel immediately following entry of the 17 November 1975 judgment and did not employ his present counsel until sometime after he gave notice of appeal.

Plaintiff contends that the trial court erred in its conclusions of law and particularly the conclusion that the court lacks discretion under Appellate Rule 25 to permit the notice of appeal to be served after the expiration of ten days following the entry of judgment. We disagree with this contention.

Rule 25 provides in pertinent part: "If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the docketing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken . . . ."

Our Appellate Rule 3(a), which is almost identical to G.S. 1-279(a), provides as follows:

> (a) *From Judgments and Orders Rendered in Session.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding during a session of court may take appeal by
>
> (1) giving oral notice of appeal at trial, or at any hearing of a timely motion under Rule 59 of the Rules of Civil Procedure for a new trial or to alter or amend a judgment, or under Rule 50 of the Rules of Civil Procedure for judgment notwithstanding the verdict with or without a motion for a new trial; or
>
> (2) filing notice of appeal with the clerk of superior court *and serving copies thereof upon all other parties* within the time prescribed by subdivision (c) of this rule. (Emphasis added.)

Rule 3(c) provides in pertinent part: "If not taken by oral notice as provided in Rule 3(a)(1), appeal from a judgment or order in a civil action or special proceeding must be taken within 10 days after its entry. . . ."

Appellate Rule 27(c) provides: "Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit

an act to be done after the expiration of such time. *Courts may not extend the time for taking an appeal prescribed by these rules or by law.*" (Emphasis added.)

Defendants argue that G.S. 1-279 and Appellate Rule 3 require both filing *and* service of notice of appeal within ten days after entry of judgment; that Appellate Rule 27(c) allows neither filing nor service to be made late; and that timely filing and service of notice of appeal are jurisdictional matters requiring dismissal for noncompliance. We find this argument persuasive.

The present N. C. Rules of Appellate Procedure and G.S. 1-279 as now written became effective 1 July 1975. While it appears that neither the Supreme Court nor this court has passed upon the question presented as it relates to the present rules and statute, we find decisions relating to superseded statutes instructive.

Prior to 1 July 1975, G.S. 1-279 and 280, provided the primary procedure for taking appeals in civil actions. The substantive provisions of these statutes are now encompassed in G.S. 1-279 and Appellate Rule 3. In numerous decisions prior to 1 July 1975, the Supreme Court and this court held that the provisions of (former) G.S. 1-279, 280, were jurisdictional and unless said statutes were complied with, the appellate court acquired no jurisdiction of the appeal and it must be dismissed. *See Teague v. Teague,* 266 N.C. 320, 146 S.E. 2d 87 (1966); *Walter Corp. v. Gilliam,* 260 N.C. 211, 132 S.E. 2d 313 (1963); *Aycock v. Richardson,* 247 N.C. 233, 100 S.E. 2d 379 (1957); and *Dunn v. Highway Commission,* 1 N.C. App. 116, 160 S.E. 2d 113 (1968).

We think the decisions cited apply with equal force to G.S. 1-279 as now written and to Appellate Rule 3. Consequently, we hold that the trial court did not err in entering the judgment dismissing the appeal.

Plaintiff has filed a petition for a writ of certiorari and we are aware of Appellate Rule 2 and of our authority to review the cause by certiorari, either on our own initiative or upon application by a party. However, after careful consideration, we have denied the petition.

Affirmed.

Judges MARTIN and HEDRICK concur.

STATE OF NORTH CAROLINA v. THOMAS BARNES

No. 769SC325

(Filed 15 September 1976)

Burglary and Unlawful Breakings § 7; Larceny § 8; Criminal Law § 124— breaking and entering and larceny — possession of recently stolen goods — instructions on consistency of verdict

In a prosecution for felonious breaking and entering and felonious larceny, the trial court erred in instructing the jury that since the State relied entirely on the doctrine of possession of recently stolen property, the jury should return the same verdict in both cases, since (1) possession of recently stolen property only raises inferences of guilt of breaking and entering and of larceny which the jury may consider with other evidence in the case, which other evidence may be sufficient to tip the scales with respect to one count but not the other and (2) consistency in the verdict is not required.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 9 January 1976 in Superior Court, WARREN County. Heard in the Court of Appeals 31 August 1976.

In a two-count bill of indictment defendant was charged with (1) breaking and entering a store building and (2) larceny of property from said store pursuant to the breaking and entering. The offenses allegedly occurred on 13 July 1975. He pled not guilty, a jury found him guilty as charged and the court consolidated the counts for purpose of judgment. From judgment imposing a prison sentence of four years as a committed youthful offender, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Charles J. Murray, for the State.

Frank Banzet for defendant appellant.

BRITT, Judge.

Defendant's sole assignment of error relates to certain of the trial court's instructions to the jury. We think the assignment has merit.

Evidence presented by the State tended to show: On the night of 12 July 1975 Joseph Boyd's store in Warren County, N. C., was broken into and a television set, together with a quantity of wine, cigarettes and bandannas were stolen therefrom. The stolen property was found in defendant's possession

at his home in Chesapeake, Virginia, on 14 July 1975. Based on information furnished by defendant, warrants were also issued for Frank Whitley, Larry Harold and Thomas Hart. Defendant waived extradition and returned voluntarily to North Carolina.

Evidence presented by defendant tended to show: He did not break or enter Boyd's store or steal any property therefrom. At about 6:00 a.m. on 13 July 1975 he was awakened at his home by Whitley, Harold and Hart who had a box of merchandise and a television set. They sold him the set for $10 and gave him the merchandise, telling him that they had gotten the property off of a ship. On 14 July 1975 he learned that the property had been stolen and at that time gave police information about Whitley, Harold and Hart.

In its charge the trial court fully instructed the jury on the presumption arising from the possession of recently stolen property. It instructed the jury that on the evidence presented they might find defendant guilty or not guilty of breaking and entering and guilty or not guilty of felonious larceny.

After the jury had deliberated for some period of time they returned to the courtroom and the foreman inquired if they were expected to return "two different verdicts," one on breaking and entering and another on larceny. The court advised that the foreman was correct and gave the following additional instruction:

> "Your verdicts must be guilty of felonious breaking or entering as charged or not guilty as to that offense. Guilty of felonious larceny or not guilty as to that offense. There are two seperate counts in a single bill of indictment requiring that you consider them separately, render separate verdicts as to each charge."

The jury returned to their room for further deliberation and at lunch time had not arrived at a verdict. Following the lunch recess they resumed their deliberations but later returned to the courtroom stating that they could not reach a verdict on the first charge. The court thereupon gave additional instructions as follows:

> "I did not in instructing you as to this case tell you that your verdict as to one of the charges ought to be the same as in the other. But I now tell you that it should.

"The evidence, ladies and gentlemen, is exactly applicable and equally applicable to the two charges on which this defendant stands indicted.

"You could not consistently find him guilty of one and not guilty of the other. You could not. The State relies entirely upon the doctrine of recent possession. That doctrine as it was explained to you raises an inference of guilt under the evidence in this case, both of breaking and entering and of larceny. It could not possibly raise the inference as to one offense and not as to the other.

"Therefore, I tell you and instruct you that you may not return a verdict of guilty as to one offense and not guilty as to the other. Your verdicts must be consistent, members of the jury, and the evidence in this case will not permit your raising the inference of guilt of breaking or entering and innocence of larceny after breaking or entering."

Thereafter, the jury resumed its deliberations and later returned a verdict of guilty as to both charges.

Defendant excepted to the latter quoted instructions and that exception is the basis of his assignment of error. We hold that the court erred in giving the instructions.

While defendant concedes that possession of recently stolen property will support both a presumption of guilt of larceny and an inference of guilt of breaking and entering, *State v. Eppley*, 282 N.C. 249, 192 S.E. 2d 441 (1972), *State v. Ledbetter*, 5 N.C. App. 497, 168 S.E. 2d 427 (1969), he argues that they are mere inferences which the jury may consider along with other evidence in the case, which other evidence may be sufficient to tip the scales with respect to one count but not the other. We find this argument persuasive.

The courts have held many times that consistency between verdicts on several counts is not required. In *Dunn v. United States*, 284 U.S. 390, 76 L.Ed. 356 (1931), quoted with approval in *State v. Jones, infra*, Justice Ho'mes, speaking for the court said: "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." In *State v. Davis*, 214 N.C. 787, 1 S.E. 2d 104 (1939), our State Supreme Court held that a jury is not required to be consistent and mere inconsistency will not invalidate the verdict.

In *State v. Jones*, 3 N.C. App. 455, 165 S.E. 2d 36 (1968), and *State v. Black*, 14 N.C. App. 373, 188 S.E. 2d 634 (1972), this court held that consistency in the verdict is not required and in both cases stated the rule as set forth in 3 Strong, N. C. Index 2d, Criminal Law, § 124, as follows:

> "It is not required that the verdict be consistent; therefore, a verdict of guilty of a lesser degree of the crime when all the evidence points to the graver crime, although illogical and incongruous, or a verdict of guilty on one count and not guilty on the other, when the same act results in both offenses, will not be disturbed."

We hold that the principle that consistency in the verdict is not necessary applies here, entitling defendant to a new trial,

New trial.

Judges HEDRICK and MARTIN concur.

L. M. THORNTON, ADMINISTRATOR OF THE ESTATE OF FREDERICK ODECT THORNTON v. ANTHONY BRUCE CARTWRIGHT AND BRUCE NORMAN CARTWRIGHT

No. 761SC316

(Filed 15 September 1976)

Automobiles § 83— wrongful death — pedestrian's contributory negligence

In a wrongful death action where the evidence tended to show that defendant was traveling south at 70 mph at night in the proper lane when he struck plaintiff's decedent, the road was level and straight for a distance of at least .3 of a mile north from the point of impact, nothing obstructed the view to the north, defendant's headlights were burning, plaintiff's decedent walked 12 or 15 feet west across the road and into the path of defendant's automobile, and decedent was not in a pedestrian crosswalk at the time of the accident, the trial court properly granted defendant's motion for directed verdict, since even if defendant was negligent in failing to see and avoid plaintiff's decedent, plaintiff's decedent was also contributorily negligent as a matter of law in failing to see and avoid defendant.

APPEAL by plaintiff from *Webb, Judge*. Judgment entered 16 December 1975 in Superior Court, CAMDEN County. Heard in the Court of Appeals 31 August 1976.

This appeal comes from a directed verdict for the defendant entered at the close of the plaintiff's evidence. Evidence tended to show that on the night of 10 November 1973 defendant, Anthony Bruce Cartwright, and plaintiff's decedent, Frederick Odect Thornton, were racing their automobiles on Rural Paved Road # 1107 in Camden County. Plaintiff's decedent stopped his car on the west side of this north-south road while defendant drove north some distance, turned around and started back. During this time, plaintiff's decedent left his car and crossed to the east side of the road to talk to the occupants of a car parked there with its headlights shining north and slightly west across Road # 1107. Defendant, returning from the north, rounded a curve at least three-tenths of a mile from the place where plaintiff's decedent and the cars were and proceeded south at a speed estimated to be between 45 and 70 m.p.h. Defendant was partially blinded by the glare of the parked car's headlights. He could see the road, but he could not see beyond the parked car, and he never saw decedent. As defendant drove south, plaintiff's decedent turned from the parked car and walked back across the 18-foot wide road. Before reaching the other side, plaintiff's decedent was struck and killed by defendant.

The trial court granted defendant's motion for a directed verdict, holding that plaintiff's decedent was contributorily negligent as a matter of law.

Moore & Moore, by Milton E. Moore, and John Harmon, for plaintiff appellant.

Leroy, Wells, Shaw, Hornthal, Riley & Shearin, P.A., by L. P. Hornthal, Jr., for defendant appellees.

ARNOLD, Judge.

When the defendant moves for a directed verdict, the evidence must be considered in the light most favorable to the plaintiff. So considered, the evidence tends to show that defendant was traveling south at 70 m.p.h., at night, in the proper lane, when he struck plaintiff's decedent. The road was level and straight for a distance of at least three-tenths of a mile north from the point of the impact, nothing obstructed the view to the north, and defendant's headlights were burning. Finally, the evidence shows that plaintiff's decedent walked perhaps twelve or fifteen feet west across the road and into the path

of defendant's automobile and that decedent was not in a pedestrian crosswalk at the time of the accident.

In the case of *Price v. Miller*, 271 N.C. 690, 157 S.E. 2d 347 (1967), the defendant was driving 60 m.p.h. in a 55 m.p.h. zone at night with her headlights burning. She had come one-half mile down a straight and level stretch of road when she struck plaintiff's intestate who was crossing the road outside of any crosswalk. The court concluded that there was a case for the jury on defendant's negligence, but even so plaintiff was guilty of contributory negligence as a matter of law. Our Supreme Court reasoned as follows:

> "If defendant were negligent in not seeing plaintiff's intestate, who was dressed in dark clothes, in whatever length of time he might have been in the vision of her headlights, then plaintiff's intestate must certainly have been negligent in not seeing defendant's vehicle as it approached, with lights burning, along the straight and unobstructed highway.
>
> We must conclude that plaintiff's intestate saw defendant's automobile approaching and decided to take a chance of getting across the road ahead of it, or in the alternative, that he not only failed to yield the right of way to defendant's automobile, but by complete inattention started across the highway without looking.
>
> In any event . . . plaintiff's intestate's negligence was at least a proximate cause of his death." 271 N.C. at 696, 157 S.E. 2d at 351.

Following *Price*, we hold that even if defendant was negligent in failing to see and avoid plaintiff's decedent, plaintiff's decedent was also contributorily negligent as a matter of law in failing to see and avoid defendant. The motion for directed verdict was correctly granted.

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. WILLIAM YANCEY CASH

No. 7610SC289

(Filed 15 September 1976)

1. **Criminal Law § 143— revocation of suspended sentence — hearing de novo in superior court**

A hearing in superior court on appeal from a district court order placing into effect a suspended sentence was *de novo* as required by G.S. 15-200.1 and G.S. 7A-271(b) where the superior court judge heard the testimony of witnesses for both sides and made his own findings of fact.

2. **Criminal Law § 143— appeal of revocation of suspension of sentence — failure to pay child support — incompetency of evidence as to visitation and custody**

In a hearing on appeal to the superior court from revocation of suspension of a sentence, the issue before the court was whether defendant violated the condition of suspension requiring him to make payments for the support of his minor child, and the court did not err in excluding evidence concerning a denial of defendant's visitation rights and whether the mother had actual custody of the child during the time defendant failed to make support payments.

3. **Criminal Law § 143— revocation of suspension of sentence — failure to pay child support — ability to pay**

The evidence was sufficient to support the court's finding that defendant was able to comply with a condition of his suspended sentence requiring him to make weekly payments for support of his minor child and that his failure to do so was without lawful excuse.

APPEAL by defendant from *Clark, Judge.* Judgment entered 21 November 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 24 August 1976.

This appeal is from an order revoking the suspended sentence of appellant for his failure to comply with the conditions of suspension.

On 21 August 1973 appellant was convicted of wilfully refusing to provide adequate support for his minor children. His six month sentence was suspended for five years upon the condition that he pay $25 a week to the Clerk of the Superior Court for child support. On 20 June 1974 this payment was reduced to $20 weekly. By 17 April 1975 appellant was $412 in arrears, and on that date, in an action by the State to revoke appellant's suspended sentence, the district court judge found that the failure to pay was not wilful but legally excused. The

court ordered appellant to commence paying $20 weekly as regular support and, in addition, to pay his arrears on or before 18 August 1975. However, appellant continued to fall in arrears, and as of 10 July 1975 he was $852 behind. On that date the State again moved to revoke appellant's suspended sentence. Notice was given to appellant, and the motion was heard in District Court in Wake County. The suspended sentence was revoked 21 August 1975. Appellant appealed for a trial *de novo* in superior court.

Hearing on the revocation was held in superior court on 21 November 1975. The court heard witnesses for both sides, concluded that appellant was in wilful violation of his suspended sentence, and ordered it revoked.

Attorney General Edmisten, by Associate Attorneys Norma S. Harrell and William H. Guy, for the State.

C. Diederich Heidgerd and Frederic E. Toms for defendant appellant.

ARNOLD, Judge.

[1] We reject appellant's position that the superior court hearing was not *de novo* as required by G.S. 15-200.1 and G.S. 7A-271(b). He contends that the superior court hearing was merely a review of the district court hearing. If the hearing were not *de novo* then the case would have to be remanded. *State v. Thompson*, 244 N.C. 282, 93 S.E. 2d 158 (1956).

This case is distinguishable from *Thompson*, where the superior court judge merely examined the record of the district court hearing, found evidence therein to support the district court judgment, and affirmed it. In this case the superior court judge heard testimony by four witnesses who were examined and cross-examined. Moreover, appellant's own testimony contained damaging admissions concerning the wrongful nature of his actions. The superior court hearing was *de novo*, and there was ample evidence to support the findings of fact by the superior court judge.

[2] Appellant next contends that the court erred in excluding evidence tending to show that his former wife did not actually have custody of their child during the time he failed to make payments, and that he was denied visiting privileges. He argues that this evidence showed changed conditions which would re-

quire a modification or revocation of the terms of his suspended sentence under G.S. 15-200.1. That statute provides:

> " . . . In all cases where . . . suspension of sentence entered in a court inferior to the superior court is revoked . . . , the defendant shall have the right of appeal therefrom to the superior court, and, upon such appeal, the matter shall be determined by the judge . . . , but only upon the issue of whether or not there has been a violation of the terms of the . . . suspended sentence. Upon its finding that the conditions were violated, the superior court shall enforce the judgment of the lower court unless the judge finds as a fact that circumstances and conditions surrounding the terms of the probation and the violation thereof have substantially changed, so that enforcement of the judgment of the lower court would not accord justice to the defendant, in which case the judge may modify or revoke the terms of the probationary or suspended sentence in the court's discretion . . . . "

Appeal to superior court from a revocation of suspended sentence is authorized "only upon the issue of whether or not there has been a violation of the terms of the . . . suspended sentence." Where the superior court finds that the terms of the suspended sentence have been violated it "shall enforce the judgment unless" it finds that the circumstances surrounding the conditions have changed so much that revocation would be unjust. However, the inquiry into changed circumstances is directed only to circumstances which are relevant to the conditions of suspension.

In this case, sentence was suspended upon condition that appellant make certain payments for the support of his minor child. The issue before the court was whether that condition had been violated, and it was not error to exclude evidence concerning appellant's visitation rights and whether the mother actually had custody.

[3] Appellant's contention that the court erred in concluding that he was able to comply with the terms of his suspended sentence, and that his failure to do so was without lawful excuse, is without merit. Evidence presented at the hearing to revoke a suspended sentence is only required to be such as to reasonably satisfy the judge in the exercise of his sound discretion that a valid condition upon which sentence was suspended has

been violated. *State v. Simpson,* 25 N.C. App. 176, 212 S.E. 2d 566; *State v. Elliott,* 22 N.C. App. 334, 206 S.E. 2d 367. There was sufficient evidence in support of the findings upon which the court concluded that appellant wilfully and without lawful excuse breached the condition of his suspended sentence.

We also find no merit in appellant's assignments of error concerning questions asked by the trial judge and the adequacy of the notice of the grounds for sentence activation. The order appealed from is

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

MATTIE S. WALL; HATTIE S. McINNIS; ALICE S. DOUGLAS; BERNICE UTLEY THOMPSON; JAMES ALLEN UTLEY; JAMES UTLEY; NORA U. LITTLE; MARGIE U. ERVIN; PETER UTLEY; JUANITA U. DAVIS; MAGALINE U. REID; AND J. J. HEENEY, ADMINISTRATOR OF THE ESTATE OF CALVIN N. SNEED, DECEASED, A CHILD OF CALVIN SNEED, DECEASED, PLAINTIFFS v. MADDIE SNEED, EXECUTRIX OF THE ESTATE OF ZOLLIE SNEED, DECEASED; MADDIE SNEED, INDIVIDUALLY; LOIS SNEED; AND HELEN SNEED, ORIGINAL DEFENDANTS

LILLIE WATKINS; LAURA COVINGTON; JOHNSIE FRYE, A CHILD OF CALVIN SNEED, DECEASED; WENONIA ANN WALL; WILLIAM HENRY SNEED; GLENN BARNES, WIDOWER; RALPH C. BARNES; ZONNIE MAE BALDWIN; GLENN BARNES, JR.; ARVEY SNEED; JOHN WATKINS; MARY JANE SNEED; AND FLOSSIE SNEED MELTON, ADDITIONAL DEFENDANTS

No. 7620SC335

(Filed 15 September 1976)

1. Trusts §§ 13, 18— parol trust — promise after passage of title

In an action to reform a deed to show that the grantee took as trustee under a parol trust for other children of the grantor, the trial court properly excluded testimony that, at some undisclosed time after the title to the land in question had been transferred to the grantee, the witness heard the grantor tell the grantee that she wanted the land divided equally among other children and that the grantee agreed to make the division, since one who is already the holder of legal title to land cannot create a valid trust thereon by an oral promise to convey the land to others at a future date, but the trust must arise, if at all, in the same transaction in which legal title passes.

2. Trusts § 18— action to establish parol trust — competency of grantee's deeds of trust

In an action to reform a deed to show that the grantee took as trustee under a parol trust, deeds of trust on the land executed by the grantee were competent to show that the grantee exercised dominion over the land in a fashion that was inconsistent with ownership of less than a fee.

APPEAL by plaintiffs from *Collier, Judge.* Judgment entered 16 February 1976 in Superior Court, RICHMOND County. Heard in the Court of Appeals 1 September 1976.

This is an action wherein plaintiffs seek to reform a deed, executed 22 August 1952, to show that the grantee took not for himself but as trustee under a parol trust for other children of the grantor. Both grantor and grantee are dead. At the first trial in July, 1971, the jury found that the grantee did not take as trustee and plaintiffs appealed. The judgment was vacated and the cause was remanded for joinder of other necessary parties. Plaintiffs filed an amended complaint on 9 July 1975. At the new trial, the jury again found that the grantee did not take as trustee and plaintiffs appealed.

Pittman, Pittman & Dawkins, by Ronald M. Cowan, for plaintiff appellants.

Page, Page & Webb, by Alden B. Webb, for defendant appellees.

VAUGHN, Judge.

An understanding of the factual background of the case and the relationship of the parties may be gained from a reading of the opinion filed after the first appeal, reported as *Wall v. Sneed,* 13 N.C. App. 719, 187 S.E. 2d 454.

[1] Plaintiff's first assignment of error relates to the exclusion of certain testimony from Arvey Sneed, a child of the grantor and brother of the grantee. The assignment of error must be overruled.

The witness was examined on *voir dire.* At the conclusion of his testimony, plaintiff moved "[f]or the purpose of the record we'd like to move that Arvey's testimony be admitted here." The motion was denied and plaintiff excepted without an attempt to offer any particular part of the testimony. If,

therefore, any of the testimony was inadmissible, the exception is without merit.

The excluded testimony tends to show that, at some undisclosed time *after* the title to the lands in question had been transferred to the grantee in the deed, the witness heard the grantor tell the grantee that she wanted the land divided equally among other children and that the grantee agreed to make the division. We need not decide whether the testimony was inadmissible under G.S. 8-51, commonly called the "dead man's statute." The grantor conveyed the legal title to the land to the grantee on 22 August 1952. The witness's testimony relates to a conversation that took place at some later date. One who is already the holder of the legal title to land cannot create a valid trust thereon by an oral promise to convey the land to others at a future date. *Beasley v. Wilson,* 267 N.C. 95, 147 S.E. 2d 577. The trust arises, if at all, in the same transaction in which the legal title passes. *Rhodes v. Raxter,* 242 N.C. 206, 87 S.E. 2d 265. The excluded evidence in the case before us tends to contradict plaintiff's claim that the trust was created when legal title passed in that it attempts to show the creation of a trust at some later time. In *Rhodes v. Raxter, supra,* plaintiff excepted to the exclusion of evidence of events that took place after legal title had passed. That evidence tended to show that the beneficiary of the alleged trust paid part of the purchase price. The Court said:

> "The exclusion of this testimony was not prejudicial to the defendants since it was not made to appear that the 'part of the purchase price' paid by Fayette Raxter was contributed prior to or contemporaneously with the passing of the legal title. Indeed, the further testimony of the witness Hamet tends to show that the contribution referred to was made after the legal title passed, the further statement of the witness being: 'When I saw him pay Mr. Raxter money, Mr. Raxter told me that it was to make a payment on the land—what they lacked of having it paid for.' " *Rhodes v. Raxter, supra,* at p. 209.

[2] Defendants were allowed, over plaintiffs' objections, to introduce several deeds of trust on the subject land which had been executed by the grantee in the deed in question. Plaintiffs' assignment of error is without merit. The evidence was competent to show that the grantee (since deceased) during his life-

time continued to exercise dominion over the land in a fashion that was totally inconsistent with ownership of less than the fee.

Plaintiffs' remaining assignments of error are directed to the charge to the jury. They have been carefully considered, and no prejudicial error has been shown.

We find no prejudicial error in the trial.

No error.

Chief Judge BROCK and Judge MARTIN concur.

BETTY HOWELL ARNOLD v. BOBBY J. ARNOLD

No. 7628DC293

(Filed 15 September 1976)

1. **Divorce and Alimony § 18— alimony pendente lite and child support — separate statement — inapplicability**

   The requirement of G.S. 50-13.4(e) that allowances for child support and alimony *pendente lite* be stated separately was inapplicable where the court found plaintiff was not a dependent spouse for purpurposes of alimony *pendente lite* and all provisions for support were solely for the benefit of the minor children.

2. **Divorce and Alimony § 22; Attorney and Client § 7— child custody and support — award of attorney's fees**

   The requirement of G.S. 50-13.6 that the court must find that the party ordered to furnish support has refused to provide adequate support in order for attorney's fees to be awarded applies only in support actions and not in custody or custody and support actions.

3. **Divorce and Alimony § 23— child support — possession of home**

   The award of possession of the home owned by the parties as tenants by the entirety to the wife and minor children for the benefit of the minor children did not constitute a writ of possession and was proper.

APPEAL by defendant from *Allen, Judge.* Judgment entered 23 March 1976 in District Court, BUNCOMBE County. Heard in the Court of Appeals 26 August 1976.

In this action, instituted 25 April 1974, plaintiff seeks a divorce from bed and board, alimony, and custody of and support for the minor children of the parties. In his answer, de-

fendant asks that plaintiff's action be dismissed and that he be granted a divorce from bed and board.

Following a hearing on a motion by plaintiff for temporary alimony and other relief, the court made findings of fact and conclusions of law and entered an order providing: (1) that plaintiff have custody of the children with specified visitation privileges in the defendant; (2) that the plaintiff and minor children have possession and control of the house and furnishings "for the benefit of the children"; (3) that plaintiff have possession and use of a 1969 Buick station wagon; (4) that defendant pay the reasonable and necessary expenses of maintaining the children, including the house payment, medical and dental expenses, medical and dental insurance coverage, maintenance of the home including the fuel bill, insurance on the automobile, and $300 per month; and (5) that defendant pay plaintiff's attorney $500. From this order, defendant appealed.

Gray, Kimel & Connelly, by David G. Gray, for plaintiff appellee.

Riddle and Shackelford, P.A., by Robert E. Riddle, for defendant appellant.

BRITT, Judge.

[1] Defendant states his first question thusly: "Did the court err in ordering the payment of child support without determining the needs of the children as distinguished from the needs of the plaintiff and the minor children jointly?" We answer in the negative.

Defendant relies upon G.S. 50-13.4(e) which in its last sentence provides that "[i]n every case in which payment for the support of a minor child is ordered and alimony or alimony pendente lite is also ordered, the order shall separately state and identify each allowance." This provision of the statute is inapplicable to the present case. The court found that plaintiff was not a dependent spouse for purposes of alimony pendente lite. No alimony was awarded and all provisions for support are solely for the benefit of the minor children.

[2] Defendant next contends that the award of counsel fees for plaintiff's attorney was improper under G.S. 50-13.6 which requires that "[b]efore ordering payment of a fee in a support

action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances. . . . " We find no merit in this contention. The Supreme Court has recently held that the requirement of a finding that the party ordered to pay support has refused to provide support applies only in support actions and not in *custody* or *custody and* support actions. *Stanback v. Sanback,* 287 N.C. 448, 215 S.E. 2d 30 (1975). The motion in the present case was for both custody and support; therefore, no finding of refusal to support was required.

[3] Finally, defendant contends that the trial judge erred in awarding possession and control of the home owned by the parties as tenants by entirety, to the plaintiff and minor children for the benefit of the minor children. Defendant argues that the award of the home as a part of child support constituted a writ of possession which is allowable under G.S. 50-17 only when the wife is entitled to alimony or alimony pendente lite. This contention is without merit. The award of the homeplace did not constitute a writ of possession and this court has specifically held that the trial judge may award exclusive possession of the homeplace, even though owned by the entirety, as a part of support under G.S. 50-13.4. *Boulware v. Boulware,* 23 N.C. App. 102, 208 S.E. 2d 239 (1974). "Certainly, shelter is a necessary component of a child's needs and in many instances it is more feasible for a parent to provide actual shelter as a part of his child support obligations than it is for the parent to provide monetary payments to obtain shelter." 23 N.C. App. at 103, 208 S.E. 2d at 240.

The judgment appealed from is

Affirmed.

Judges HEDRICK and MARTIN concur.

TRAVENOL LABORATORIES, INC. v. CONRAD K. TURNER, CUTTER LABORATORIES, INC., AND BILLY MORRIS

No. 7614SC271

(Filed 6 October 1976)

1. **Courts § 21— validity of covenants not to compete — what law governs**

The validity of contracts containing covenants not to compete was governed by California law, the law of the place where the contracts were made, and under such law the covenants were invalid.

2. **Courts § 21— duty in tort — what law governs**

The existence of a duty in tort is determined under the law of the state in which the relationship giving rise to the duty was created.

3. **Unfair Competition— employee's disclosure of confidential information — California law**

Where an employer-employee relationship arose and was terminated in California, a duty by the employee not to disclose confidential information of the employer arose in tort as unfair competition under California law.

4. **Injunctions § 6; Unfair Competition — preventing disclosure of trade secrets**

An injunction will issue to prevent unauthorized disclosure and use of trade secrets and confidential information.

5. **Injunctions § 13— requirements for preliminary injunction**

In order to gain a preliminary injunction, a plaintiff must show (1) probable cause of success on the merits at trial, and (2) a reasonable apprehension of irreparable injury unless interlocutory relief is granted.

6. **Injunctions § 13; Master and Servant § 11; Unfair Competition — prohibiting disclosure of trade secrets — likelihood of disclosure**

To establish a reasonable apprehension of irreparable injury in an action for a preliminary injunction to prevent a former employee's disclosure of trade secrets and confidential information, the plaintiff must establish a high likelihood of disclosure of the information; in determining such likelihood, the courts will consider such factors as the circumstances surrounding termination of the employment, the importance of the employee's job, the type of work performed by the employee, the kind of information sought to be protected, and the need of the competitor for the information.

7. **Master and Servant § 11; Unfair Competition — prohibiting competitor's employment of former employee**

Plaintiff was not entitled to a preliminary injunction preventing a former employee from working for a competitor as a manager of plasma fractionation solely as a means of enforcing the former employee's duty not to disclose confidential information where: the employee had no specialized technical training and was employed

at plaintiff's production facility, not at its research and development facility; the employee terminated his employment with plaintiff on his own accord and was not contacted by his new employer until after such termination; and plaintiff and the competitor have achieved comparable success in plasma fractionation.

8. **Master and Servant § 11; Unfair Competition— former employee — prohibiting disclosure of modification of centrifuge**

The trial court properly entered a preliminary injunction prohibiting plaintiff's former employee from disclosing to a competitor plaintiff's modification of a centrifuge used in plasma fractionation where plaintiff showed that the centrifuge is used in production, the former employee occupies a high level supervisory position in production of plasma fractions by the competitor, and some of plaintiff's competitors have tried without success to make a similar modification of the centrifuge; however, the court erred in prohibiting the disclosure of "all information regarded as confidential" where plaintiff failed to show the use of unique processing other than the modified centrifuge.

9. **Master and Servant § 11; Unfair Competition— former employee — prohibiting disclosure of written confidential information**

The court erred in granting a preliminary injunction prohibiting plaintiff's former employee from disclosing to a competitor any written documents obtained by the employee from plaintiff containing trade secrets or other confidential information where there was nothing in the record to show that the employee took or possessed such documents or that the employee had any motive to take or use such documents.

APPEAL by plaintiff and by defendants from *Preston, Judge.* Order entered 28 November 1975, in Superior Court, DURHAM County. Heard in the Court of Appeals 17 June 1976.

Plaintiff, Travenol Laboratories, Inc. (hereinafter called Travenol), a pharmaceutical manufacturing firm, seeks injunctive relief to protect its trade secrets and to limit the employment of defendant Turner by a competitor, Cutter Laboratories, Inc. (hereinafter called Cutter). The corporate plaintiff and corporate defendant are engaged in the manufacturing process of "plasma fractionation," which includes the extraction, processing and sale of human blood components, or plasma fractions used in medical treatment and research. Cutter and Travenol are two of the largest producers of plasma fractions. Plasma fractionation is achieved by use of the Cohn process. The Cohn process is a standard five-variable system that has been used for decades by all the major producers of blood fractions. The standard Cohn process produces different plasma fractions as the five factors are varied. Those factors are (1)

the alcohol concentration used for precipitation; (2) the pH; (3) the salt concentration; (4) the protein concentration; and (5) the temperature. The yield of fractions per liter accounts for the profitability of the process. Each manufacturer can affect the yield primarily in two ways: (1) by variation of the five factors of the Cohn process, and (2) by use of different equipment and facilities. The optimal variations for each manufacturer are determined through research and development; once these standards have been determined, the production department may not change them, but must adhere rigidly to the correct standards to produce the desired quality and yield.

Defendant Turner was employed in plaintiff's plasma fractionation plant located at Glendale, California, from 1953 until 1973, at all times in management and production positions. He rose steadily in the facility, becoming in turn a supervisor, a production manager, an assistant plant manager, plant manager, and director of therapeutics manufacture.

In 1966 and 1971 Turner executed written employment agreements with plaintiff. These agreements, which are essentially identical, included both a covenant not to compete and a covenant not to disclose or use trade secrets and confidential information. Plaintiff acknowledges that the covenant not to compete, made in California, is invalid under California law and does not rely on this covenant. Plaintiff still seeks, however, to limit defendant Turner's employment with Cutter as a remedy to prevent violation of the covenant not to disclose.

Turner terminated his employment with plaintiff about 5 September 1975, although he continued to be paid until 3 October 1975, and in his deposition testified that his reasons for doing so were lack of communication between plaintiff's new president and him and changes in the manufacturing process effected by management. Turner had also recently been divorced.

Turner was contacted by several firms, including Abbott Laboratories, another major competitor of Travenol. His first contact with Cutter did not take place until after 1 October 1975. On 31 October 1975 Turner was employed by Cutter as production manager of plasma fractionation at its new plant located in Clayton, North Carolina. Defendant Morris was then the director of the plant. This facility was devoted to the manufacture, production and sale of human plasma components. All

research and development facilities of Cutter remained in California.

On 3 November 1975, Judge Preston entered a temporary restraining order which enjoined defendant Turner from working for defendant Cutter and from revealing to said defendant any trade secrets acquired by him during his employment by plaintiff. This order set the time and place for a hearing on plaintiff's motion for preliminary injunction. At this hearing the court considered the pleadings, depositions, affidavits and briefs submitted by the parties.

The affidavits and depositions submitted by the plaintiff tended to show the following: There are eight companies in the United States engaged in the business of human plasma fractionation. All eight companies use the same general process, the Cohn process, but plaintiff has developed numerous secret refinements of the Cohn process which enable it to produce a greater yield per liter of better quality than its competitors. These secret refinements include the exact temperature at which certain procedures are performed and modifications made in the Westphalia centrifuge, an item of equipment used in the fractionation process. During his period of employment defendant Turner became familiar with all of plaintiff's trade secrets in the production of plasma fractions.

In opposition defendants submitted depositions and affidavits tending to show the following: Defendant Turner was employed by defendant Cutter to work entirely in the area of manufacturing at its Clayton plant, not in its research and development facilities in California. He was not a college graduate and had not been given scientific training by plaintiff. When he signed the covenants not to compete or disclose submitted to him by plaintiff in 1966 and 1971 he was not given a salary increase or any other benefits, but was told that unless he signed the covenants he would be fired. He was employed by defendant Cutter for his management skills. He had not received from Travenol any writings concerning any trade secrets or confidential information. He had not been asked to reveal any of plaintiff's trade secrets and does not intend to do so. The methods used in the plasma fractionation process are standard throughout the industry, have been published and are not secret. Plaintiff had employed former employees of defendant Cutter Laboratories and had asked them to reveal all they knew about the fractionation process used by Cutter.

The trial court found that the covenants not to compete signed by defendant in 1966 and 1971 while employed by plaintiff were invalid under California law, and refused to enjoin defendant Turner from working for defendant Cutter, either under the contracts or as a means of enforcing the duty not to disclose confidential information. However, the court preliminarily enjoined defendant Turner from revealing any of plaintiff's trade secrets, and "all information regarded as confidential," including information concerning the mechanical modification by plaintiff of the Westphalia centrifuge, and enjoined defendants Cutter and Morris from inquiring of Turner or otherwise obtaining plaintiff's trade secrets.

All parties appealed.

Sanford, Cannon, Adams & McCullough by J. Allen Adams, Robert W. Spearman, and H. Hugh Stevens, Jr., for plaintiff appellant-appellee, Travenol Laboratories, Inc.

Boyce, Mitchell, Burns & Smith by G. Eugene Boyce and James M. Day for defendant appellant-appellee, Conrad K. Turner.

Womble, Carlyle, Sandridge & Rice by Charles F. Vance, Jr., Linwood L. Davis and W. Andrew Copenhaver for defendant appellants-appellees, Cutter Laboratories, Inc. and Billy Morris.

CLARK, Judge.

This case presents several issues for resolution. At the outset we are presented with a conflict of laws issue. The employment agreements executed by the defendant Turner in 1966 and 1971 were made in the State of California, where Turner was then employed by plaintiff. These agreements, substantially identical, contained (1) a covenant not to compete, and (2) a covenant not to disclose confidential information and trade secrets.

[1] The validity of these contracts is governed by California law, the law of the place where the contracts were made. *Fast v. Gulley*, 271 N.C. 208, 155 S.E. 2d 507 (1967). Plaintiff concedes that the covenant not to compete is invalid under the California statute entitled "Contracts in Restraint of Trade," which provides that: " . . . every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." West. Ann. Cal. Bus.

& Prof. Code § 16600 (1964). *Frame v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 20 Cal. App. 3d 668, 97 Cal. Rptr. 811 (1971).

[2, 3] Defendants next urge the invalidity under California law of the covenants not to disclose confidential information and trade secrets. We find it unnecessary to resolve the issue of contractual validity because the same duty not to disclose confidential information of the employer arises in tort as unfair competition under California law. West. Ann. Cal. Labor Code § 2860 (1971); *Cal. Intelligence Bureau v. Cunningham*, 83 Cal. App. 2d 197, 188 P. 2d 303 (1948); *Riess v. Sanford*, 47 Cal. App. 2d 244, 117 P. 2d 694 (1941). The existence of a duty in tort is determined under the law of the state in which the relationship giving rise to the duty was created. *Young v. R. R.*, 266 N.C. 458, 146 S.E. 2d 441 (1966). The employer-employee relationship in this case arose and was terminated in California. We note that the existence of this duty is recognized under the law of North Carolina as well as the law of California. *Kadis v. Britt*, 224 N.C. 154, 29 S.E. 2d 543 (1944); *Machinery Co. v. Milholen*, 27 N.C. App. 678, 220 S.E. 2d 190 (1975). The complaint, though alleging the breach of a covenant against disclosure, sufficiently alleges a tort violation arising under the employer-employee relationship. Since the courts will not enforce a negative covenant not to disclose if it imposes rules unnecessary to the protection of the employer or that are unreasonable, the duty not to disclose under the contractual covenant is no broader than the duty arising in tort. Further, we are now concerned with injunctive relief which should not be extended beyond the threatened injury. 2 R. Callman, Unfair Competition, Trademarks and Monopolies, p. 490, (3d Ed. 1968).

Although this duty was originally grounded in the property right of the employer in confidential information, it is now felt that the duty arises because of the trust and confidence imposed by the employer upon the employee. Restatement (Second) Agency § 396 (1958); Restatement Torts § 757 (1939); D. Dobbs, Remedies § 10.5 (1973). In enforcing this duty, courts must weigh the importance of two policies central to a free market economy. On the one hand, to promote experimentation with new ideas, the employer must feel free to entrust confidential ideas and information to employees without fear that competitors will unfairly gain access to such information. On the other hand, the employee must have the freedom to sell skills fairly and honestly acquired to the highest bidder. This reflects

a commitment to market efficiency, but more importantly to personal freedom in choosing one's employment. North Carolina has a particular commitment to the importance of this freedom reflected in the Right to Work Law, G.S. Chap. 95, Art. 10.

[4] These policies must be weighed by a court in considering an application for injunctive relief. While the substantive law being administered here is that of California, the procedural law, including that of injunctive relief, is that of North Carolina. *Cobb v. Clark,* 265 N.C. 194, 143 S.E. 2d 103 (1965). Restatement (Second) Conflict of Laws § 131 (1971). An injunction is an extraordinary remedy and will not be lightly granted. *Huskins v. Hospital,* 238 N.C. 357, 78 S.E. 2d 116 (1953). It is well settled that an injunction will issue to prevent unauthorized disclosure and use of trade secrets and confidential information. *Kadis v. Britt, supra; Machinery Co. v. Milholen, supra.*

[5, 6] In order to gain a preliminary injunction, a plaintiff must show (1) probable cause of success on the merits at trial, and (2) a reasonable apprehension of irreparable injury unless interlocutory relief is granted. *Pruitt v. Williams,* 288 N.C. 368, 218 S.E. 2d 348 (1975); *Setzer v. Annas,* 286 N.C. 534, 212 S.E. 2d 154 (1975); *U-Haul Co. v. Jones,* 269 N.C. 284, 152 S.E. 2d 65 (1967). To establish a reasonable apprehension of irreparable injury in a case such as this the plaintiff must establish that the likelihood of disclosure of the information is high. In making these determinations courts weigh several factors, among them the circumstances surrounding the termination of employment, the importance of the employee's job, the type of work performed by the employee, the kind of information sought to be protected, and the need of the competitor for the information. *Engineering Associates v. Pankow,* 268 N.C. 137, 150 S.E. 2d 56 (1966), (injunction denied); *Machinery Co. v. Milholen, supra,* (preliminary injunction granted); *Moye v. Eure,* 21 N.C. App. 261, 204 S.E. 2d 221 (1974), *cert. denied,* 285 N.C. 590, 205 S.E. 2d 723 (1974) (preliminary injunction denied); 2 R. Callman, *supra,* at § 59.1.

Plaintiff has sought injunctive relief in three separate areas: (1) to prevent defendant Turner from working for defendant Cutter as a means of enforcing the duty not to disclose confidential information; (2) to prevent defendant Turner from disclosing "all information regarded as confidential,"

including the mechanical modification of the Westphalia centrifuge; and (3) to prevent defendant Turner from disclosing any written trade secrets or other writings containing confidential information and to prevent Cutter from obtaining the same from Turner. We now consider each of these requests in light of the law of injunctive relief set forth above.

[7] First, plaintiff has sought to enjoin defendant Turner from working for Cutter as a manager of plasma fractionation. Plaintiff does not oppose Cutter's employment of Turner in any capacity other than manager of plasma fractionation. Plaintiff contends that such an injunction is necessary to prevent disclosure of confidential information because disclosure would be inevitable if Turner were to perform his job diligently and to his utmost ability. North Carolina courts have never enjoined an employee from working for a competitor merely to prevent disclosure of confidential information. Courts in other jurisdictions have granted such injunctive relief very infrequently in special circumstances not present here. In each case the employee had specialized technical training and was involved in research and development. There were circumstances of bad faith or underhanded dealing and the competitor lacked comparable level of technical knowledge and achievement. In *E. I. duPont de Nemours & Co. v. American Potash & Chemical Corp.*, 41 Del. Ch. 533, 200 A. 2d 428 (Ct. Ch. 1964), the issuance of a preliminary injunction was affirmed where an employee with a PhD in chemical engineering who had engaged in research and development of manufacture of titanium dioxide pigments by a chloride process was recruited for the same job by a competitor who had requested and been refused a license to the chloride process. In *Allis-Chalmers Manufacturing Company v. Continental Aviation and Engineering Corp.*, 255 F. Supp. 645 (E.D. Mich. 1966), the court affirmed the issuance of an injunction where a mechanical engineer who was the head of a laboratory responsible for all research and testing of a fuel injection pump which only three other companies had successfully developed after many years of work, and several others had failed, was hired by a competitor who had been negotiating for a license to do the same work. In the present case we have an employee skilled in management who has spent his career in production positions. He has no scientific or technical skills beyond those acquired ancillary to his responsibility to produce a product of high quality. He terminated his employment of his own accord, and was not contacted by his new employer for

some weeks after leaving the old one. Cutter and Travenol are the two largest producers of plasma fractions and have achieved comparable success in plasma fractionation. Cutter employed Turner at its production facility, not its research and development facility. The likelihood of broad disclosure in these circumstances is slight. These facts are very similar to those in *Standard Brands, Inc. v. Zumpe,* 264 F. Supp. 254 (E.D. La. 1967), where the court refused to enjoin the employment of a plant manager who had no technical education, who had had access to confidential information, and who had conferred with research personnel on the production aspects of their problems. The court noted that there was no showing of an intent to disclose, nor could inevitability of disclosure be presumed from employment in a managerial capacity.

A court of equity must weigh all relevant facts before resorting to the extraordinary remedy of an injunction. We think it clear on these facts that the trial court was correct in concluding that it would be unduly harsh to enjoin Turner from working for Cutter solely to enforce the duty of an employee not to disclose confidential information.

[8] Second, Travenol has sought and the trial court has granted an injunction to prevent Turner from revealing "all information regarded as confidential . . . including but not limited to information concerning the mechanical modification of the Westphalia centrifuge . . . " and to prevent Cutter from receiving the same. Again we must weigh the factors relevant to the likelihood of disclosure in determining the appropriateness of injunctive relief. Ordinarily, mere employment by a competitor alone will not create a likelihood of disclosure sufficient to support an injunction. *Kadis v. Britt, supra.* An employee may take from his employment general knowledge and skills. *Engineering Associates v. Pankow, supra.* Travenol has clearly shown that it is probable that at trial it will establish that the mechanical modification of the Westphalia centrifuge is a trade secret. This modification has been the subject of research and development and would be of current use to Cutter in its production process. Turner has worked in the production field for 22 years. Since this is precisely the field in which Turner will be employed by Cutter, not merely as a worker but at a high level supervisory position, the possibility of disclosure is high even absent any underhanded dealing in the circumstances of his termination of employment with Travenol.

Travenol has also presented evidence showing that several competitors have tried without success to make a similar modification. The disclosure of this modification would cost Travenol a competitive advantage worth many thousands of dollars. We find, therefore, that with respect to the modification of the Westphalia centrifuge, the trial court was correct in issuing a preliminary injunction in Travenol's favor.

We cannot agree, however, that Travenol has made an adequate showing to support that part of the injunction broadly prohibiting disclosure of "all information regarded as confidential." This provision presents problems of scope and nebulosity. The showing made with respect to the centrifuge modification rested upon its use in production, Turner's high level position in production, and the failure of competitors to make a similar modification. These factors have no bearing to the more broadly phrased part of the injunction. In *Engineering Associates v. Pankow, supra,* the court affirmed the denial of an injunction which would have broadly prohibited disclosure of "any information, plans, knowledge or trade secrets." The defendant-employee, an engineer, was hired by a competitor and admitted that he possessed trade secrets, but the court could find no abuse of confidence or bad faith in later employment to justify an injunction of such great scope. *Sub judice,* Travenol apparently considers its entire production process as secret and confidential. Yet it appears that Travenol, Cutter and other competing enterprises use the standard Cohn process in their plasma fractionation operations. Though there may be some variation in the production process among the competing enterprises, Travenol has failed to show unique processing, other than the modified Westphalia centrifuge, the disclosure of which would result in irreparable damage. In *Machinery Co. v. Milholen, supra,* the court recently affirmed the issuance of a preliminary injunction containing some broad language upon a clear showing of bad faith by former high level employees in engineering and sales. While we emphasize that the facts and circumstances of each case dictate the propriety of injunctive relief, we think that this case is closer to *Pankow* than *Milholen,* and that the scope of the injunction here is so broad that the defendant Turner may be deprived of the right to use his own skills and talents in his work for Cutter.

[9] Third, plaintiff has sought and the court has granted an injunction prohibiting use or disclosure of any written docu-

ments obtained by Turner from Travenol which contain any trade secrets, information about research and development, technical memos, laboratory notebooks, specifications, cost and pricing data, or analyses of competitive products. There is nothing in the record to show that Turner took or possesses any such documents. Indeed Travenol produced evidence of an admirable security system. There is nothing in the record which would show any motive on the part of Turner to take or use such documents. Travenol has failed to show a likelihood of disclosure of such documents. We find no grounds for the issuance of a preliminary injunction with respect to any written documents. An injunction will not be issued merely to allay the fears and apprehensions or to soothe the anxieties of a party. Nor will an injunction be issued to restrain one from doing that which he is not attempting to do. *Engineering Associates v. Pankow, supra; Standard Brands, Inc. v. Zumpe, supra.*

We approve and affirm only that part of the preliminary injunction which enjoins the defendant Turner from revealing, and the defendant Cutter from seeking to obtain, any confidential information concerning the modification of the Westphalia centrifuge by plaintiff Travenol.

Affirmed in part and reversed in part, and remanded for disposition in accordance with this opinion.

Judges MORRIS and VAUGHN concur.

SAMUEL MANGANELLO v. PERMASTONE, INC.

No. 7612SC275

(Filed 6 October 1976)

1. **Negligence § 53— swimming pool — duty of owner to patrons**

The owner or proprietor of a bathing or swimming resort or pool as a place of public amusement is not an insurer of the safety of his patrons, but he must exercise ordinary and reasonable care and prudence to have and maintain his place and all appliances intended for the use of patrons in a reasonably safe condition for all ordinary, customary, and reasonable uses to which they may be put by patrons, and to use ordinary and reasonable care for the safety of his patrons, and he may be liable for injury to a patron from breach of his duty.

2. Negligence § 53— swimming pool — dangerous activity of invitees — duty of owner to other patrons

Where a dangerous condition or activity occurring in a bathing or swimming resort or pool arises from the act of third persons, whether themselves invitees or not, the owner of the resort or pool is not liable for injury resulting unless he knew of its existence or it had existed long enough for him to have discovered it by the exercise of due diligence and to have removed or warned against it.

3. Negligence § 57— swimming pool — dangerous horseplay of patrons — duty of owner to other patrons

In an action to recover against a swimming facility proprietor for injuries sustained by plaintiff when a third person, who was engaging in horseplay in the lake, fell on him, the trial court properly granted defendant's motion for a directed verdict, since the evidence indicated that the horseplay had been going on for 30-45 minutes at some distance from plaintiff, plaintiff considered the horseplay no "problem" to him, plaintiff and the people engaged in the horseplay then moved to different locations in the lake so that the activity became dangerous to plaintiff, and the danger did not exist for a sufficient period of time to put defendant on notice.

Judge MARTIN dissenting.

APPEAL by plaintiff from *Hall, Judge.* Judment entered 20 November 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 18 June 1976.

In his complaint plaintiff alleges that defendant operated Permastone Lake; that plaintiff went swimming in the lake on Labor Day in 1973; that other swimmers, whose names plaintiff does not know, were engaged in dangerous horseplay; that one of those swimmers fell on plaintiff, causing injuries to his neck and head; and that the horseplay had been going on long enough for defendant's lifeguards to have seen and stopped it. In its answer defendant denied negligence and pleaded contributory negligence.

After plaintiff presented his evidence at trial, defendant's motion for a directed verdict was allowed and from judgment dismissing the action, plaintiff appealed.

Smith, Geimer & Glusman, P.A., by Kenneth Glusman, for plaintiff appellant.

Clark, Clark, Shaw & Clark, by Heman R. Clark, for defendant appellee.

BRITT, Judge.

The sole question presented by this appeal is whether the trial court erred in granting defendant's motion for directed verdict. We hold that the court did not err.

[1] The degree of care that the proprietor of a swimming facility owes his customers is well summarized in *Wilkins v. Warren,* 250 N.C. 217, 219, 108 S.E. 2d 230, 232 (1959), where our Supreme Court said:

> " . . . the general rule is stated in these words: 'The owner or proprietor of a bathing or swimming resort or pool as a place of public amusement is not an insurer of the safety of his patrons, but he must exercise ordinary and reasonable care and prudence to have and maintain his place and all appliances intended for the use of patrons in a reasonably safe condition for all ordinary, customary, and reasonable uses to which they may be put by patrons, and to use ordinary and reasonable care for the safety of his patrons, and he may be liable for injury to a patron from breach of his duty.' (Citations omitted.)"

[2] While the proprietors of bathing or swimming resorts or pools owe to their patrons a duty to exercise due care, not only to provide a safe and proper place but to supervise the premises in order to protect patrons from wanton and unprovoked injuries by other persons there, our Supreme Court has said:

> " '[I]t is only when the dangerous condition or instrumentality is known to the occupant [owner], or in the exercise of due care should have been known to him . . . that a recovery may be permitted.' (Citation omitted.) In the place of amusement or exhibition, just as in the store, when the dangerous condition or activity is created or engaged in by the owner or his employee, the owner is charged with immediate knowledge of its existence, *but where it arises from the act of third persons, whether themselves invitees or not, the owner is not liable for injury resulting unless he knew of its existence or it had existed long enough for him to have discovered it by the exercise of due diligence and to have removed or warned against it.* (Citations omitted.)" *Aaser v. City of Charlotte,* 265 N.C. 494, 499, 144 S.E. 2d 610, 615 (1965). (Emphasis ours.)

We now summarize the stipulations and evidence presented at trial. It was stipulated that the defendant operated a recreational facility, including Permastone Lake; that the lake was open to the public for swimming upon payment of a fee; and that defendant employed lifeguards at the lake.

Plaintiff testified in pertinent part:

[3] On Labor Day 1973 he, his three children and two other families went to Permastone Lake, a body of water containing one or two acres and located west of Hope Hills, N. C. At that time he was 39 years old and a sergeant first-class in the U. S. Army in which he had served for sixteen years. Plaintiff and his group paid the required admission fees and thereafter he and the seven or eight children in the party went into the water.

The lake was moderately crowded and he and the children spent approximately an hour in the area of a sliding board. While the children slid down the board he stood in water up to his chest and would catch them. Approximately 30 or 45 minutes after he entered the water, he heard a lot of shouting nearby and observed several young men, some 20 or 30 feet away, getting on each other's shoulders and jumping into the water. At that distance "they weren't causing me any problems." About 30 to 45 minutes later, feeling that he and the children had been in the water long enough, he sent the children to a dock or pier some 50 or 60 feet away and began swimming to the dock himself. Soon thereafter one of the young men (who was jumping into the water from his father's shoulders) fell on top of him, pushed him to the bottom of the lake and caused the injuries complained of.

On cross-examination plaintiff stated: " . . . I did not see any danger to myself or my children or the people around the slide while I was there with the children. The last time I saw the men they were far enough away that I was not concerned about them. . . . "

Plaintiff's witness, Mrs. Grombkowski, testified in pertinent part: She, her husband and children, went with plaintiff to Permastone Lake on the day in question. Her children, along with plaintiff's children, were playing on the sliding board and plaintiff was in the water catching them. Not long after they entered the water, she saw the young men engaged in horseplay nearby. They gradually moved closer to the sliding

board where plaintiff was. After plaintiff left the sliding board and got halfway to the pier, she saw one of the young men jump from the shoulders of his father and land on plaintiff's head. She estimated that the sliding board was 50 or 60 feet from the end of the dock or pier. There were two lifeguards, approximately 16 or 17 years old, on duty. Part of the time they were watching the people in the water but at other times they were talking to girls. They did not go to plaintiff when he was hurt.

On cross-examination Mrs. Grombkowski stated: "I did not keep my eyes on them the whole time. I don't really know whether they gradually moved up or moved up suddenly. . . . As he was swimming towards us, I saw this danger out of the corner of my eye and hollered to him. He was swimming. . . . "

Plaintiff's witnes Cobb, a Y.M.C.A. physical director, testified that the American Red Cross and the Y.M.C.A. had promulgated certain standards of aquatic safety as guidelines for people operating swimming facilities; that these standards were accepted in Cumberland County; and that it was not acceptable aquatic practice to allow young men to get on another's shoulders and do "backflips" into the water.

Plaintiff argues that in this case it was incumbent on him to show (1) that he was an invitee, (2) some activity dangerous to him was occurring, (3) the dangerous activity had been going on for a sufficient period of time for defendant, in the exercise of reasonable care, to have taken notice of it, and (4) defendant did not use reasonable means to stop the dangerous activity. We agree with the argument but do not feel that the evidence established the points suggested.

It goes without saying that the activity engaged in by the ones who caused plaintiff's injury was dangerous to him only if it occurred in close proximity to him. He testified that for some 30 to 45 minutes the young men engaged in the activity were 20 to 30 feet from him and caused him "no problem." The "problem" arose when plaintiff left the sliding board and was walking or swimming to the dock approximately 50 or 60 feet away. At that time the ones who caused his injury were changing their location—either gradually or suddenly—according to Mrs. Grombkowski. When plaintiff moved his position some 25 or 30 feet—one-half the distance from the sliding board to the dock—and the ones who caused his injury changed theirs, the hazardous situation was created.

The evidence failed to show that the hazardous situation thereby created existed for a sufficient period of time for defendant's lifeguards, in the exercise of reasonable care, to have taken notice of the situation and to have taken means necessary to alleviate it.

In *Aaser v. City of Charlotte, supra,* plaintiff was a paying spectator at an ice hockey game in the Charlotte Coliseum. She was injured when her ankle was hit by a puck as she was walking along a corridor. Her evidence was that immediately after the injury she saw boys with hockey sticks playing in the corridor and the director of the hockey club told her the boys had been playing in the corridor before that time with hockey pucks and sticks. The Supreme Court reversed a jury verdict for plaintiff, holding that a proprietor may be liable for injuries resulting from horseplay or boisterousness of others only if the defendant has had sufficient notice to enable him to stop the activity. We quote from the opinion:

> "Since what constitutes reasonable care varies with the circumstances, the vigilance required of the owner of the arena in discovering a peril to the invitee and the precautions which he must take to guard against injury therefrom will vary with the nature of the exhibition, the portion of the building involved, the probability of injury and the degree of injury reasonably foreseeable. The law does not require the owner to take steps for the safety of his invitees such as will unreasonably impair the attractiveness of his establishment for its customary patrons. . . . " 265 N.C. at 499, 144 S.E. 2d at 614.

Plaintiff appears to contend that defendant was put on notice with respect to a "dangerous activity" when the horseplay first began. We do not find this contention persuasive, particularly in view of plaintiff's testimony that those engaged in the activity were 20 or 30 feet away from him at the time and were no "problem" to him. The activity became dangerous to plaintiff when he moved some 25 or 30 feet and those engaged in the activity moved an unstated distance. We do not think the activity, after it became dangerous to plaintiff, existed for a sufficient period of time to put defendant on notice.

For the reasons stated, the judgment appealed from is

Affirmed.

Judge HEDRICK concurs.

Judge MARTIN dissents.

Judge MARTIN dissenting.

At trial, it was stipulated that defendant operated a recreational facility, including Permastone Lake, that the lake was open to the public for swimming upon payment of a fee, and that defendant employed lifeguards at the lake.

Plaintiff was in the area of a sliding board overseeing the children slide and swim; the water was up to his chest; he heard a lot of shouting nearby and saw several young men standing on each other's shoulders about 20 or 30 feet away; about 30 to 45 minutes later he told the children to get out of the water and he started swimming toward the dock; someone hit him on the neck and pushed him to the bottom of the lake; he was helped out of the water and felt severe pain from his head through his shoulders. Dr. Askins diagnosed the injury as a mild to moderate cervical sprain with no bone or joint abnormality, and he testified that the blow suffered at the lake could have caused the injury.

A YMCA physical director testified that the American Red Cross and the YMCA had promulgated certain standards of aquatic safety as guidelines for people operating swimming facilities; these standards were accepted in Cumberland County, and that it was not acceptable aquatic practice to allow young men to get on one another's shoulders and do back flips into the water.

On a motion for directed verdict by the defendant, the plaintiff's evidence must be taken to be true and considered in the light most favorable to him and he must be given the benefit of all reasonable inferences with the resolution of all inconsistencies in his favor. See *Anderson v. Butler,* 284 N.C. 723, 202 S.E. 2d 585 (1974); *Jones v. Satterfield Dev. Co.,* 16 N.C. App. 80, 191 S.E. 2d 435 (1972). Considered in this manner, the evidence in the instant case tends to show that a

directed verdict for the defendant should not have been granted. The evidence offered by plaintiff showed his presence at the pool as a patron, entitled to be there; the presence of other persons in the pool area; the conduct of those persons whereby they were riding, standing and jumping off the shoulders of each other in a dangerous manner; that this conduct continued for over twenty minutes to an hour without warning or hindrance by the defendant's lifeguards or anyone else to prevent it; that without warning, one of the persons engaged in the horseplay fell on plaintiff with resulting injury.

Mrs. Mary Ann Grombkowski, testified: "There were three men together and the father . . . and one of the boys would stand on his shoulders and jump backwards into the water. . . . Prior to the time the accident occurred, this jumping activity had gone on for about twenty minutes. Usually there were two lifeguards. There was one at the far end of the pier, the deep end, but I cannot say for sure if there was one at the shallow end. During the time that the activity of jumping off the shoulders was going on the men did not stay in the same place. They gradually moved out to where Sgt. Manganello was in the water. It took them about fifteen minutes to do this. . . . I saw him jumping off the shoulder right where Sam was and he landed on Sam's head. The young boy was jumping off his father's shoulder. He jumped backwards. His back struck Sgt. Manganello. Sam went down . . . he was knocked silly. . . . There were lifeguards at Permastone Lake on the third of September 1973. These were young teenagers about sixteen or seventeen years old. The lifeguards would sit around in their high chairs. Sometimes they would be watching and sometimes they would be talking to girls. There were a couple of girls around the lifeguards. I believe that the man that fell on Sam was seventeen or eighteen years old and he was about five and one-half feet tall."

> " '[I]t is only when the dangerous condition or instrumentality is known to the occupant (owner), or in the exercise of due care should have been known to him . . . that a recovery may be permitted.' (Citation omitted.) In the place of amusement or exhibition, just as in the store, when the dangerous condition or activity is created or engaged in by the owner or his employee, the owner is charged with immediate knowledge of its existence, but where it arises from the act of third persons, whether themselves

invitees or not, the owner is not liable for injury resulting unless he knew of its existence or it had existed long enough for him to have discovered it by the exercise of due diligence and to have removed or warned against it. (Citations omitted.)

'The proprietor is liable for injuries resulting from the horseplay or boisterousness of others, regardless of whether such conduct is negligent or malicious, if he had sufficient notice to enable him to stop the activity. But in the absence of a showing of timely knowledge of the situation on his part, there is no liability.' " *Aaser v. Charlotte*, 265 N.C. 494, 499, 144 S.E. 2d 610, 615 (1965).

Proprietors of bathing or swimming resorts or pools owe to their patrons a duty to exercise due care, not only in providing a safe and proper place as such, but in policing and supervising the place to protect those coming there from wanton and unprovoked assault and injuries at the hands of other persons there.

Liability for misconduct of patrons varies with the circumstances. The duty would be greater with respect to a swimming facility, when the water poses inherent dangers and where lifeguards are employed for the specific purpose of keeping a lookout over all patrons. In the instant case, the evidence is sufficient to show that the dangerous activity had been in progress for a sufficient time for the lifeguard to take notice of it and to control such behavior so as to have prevented the injury.

In *Sneed v. Lions Club*, 273 N.C. 98, 159 S.E. 2d 770 (1968), Higgins, Justice, speaking for the Court, said:

"Many courts and commentators have discussed the duties which swimming pool operators owe their paying invitees. The following appears to be a fair summary of the rules applicable to the questions presented in this appeal. The operator of a swimming pool for hire does not insure the safety of his invitees. He does, however, owe them the duty to exercise due care to see that his premises are reasonably safe for the purposes for which he offers them to the public. He is under a duty to install and maintain proper signs warning patrons of dangerous depths of the water. He should exercise ordinary care to provide a sufficient number of competent attendants to supervise the bathers and to rescue any of those who appear to be in danger. . . ."

In the case of *Quinn v. Smith Co.*, 5 Cir., 57 F. 2d 784, which originated in the Southern District of Florida, it was held that it was a breach of such duty owed by an operator of a swimming pool, to permit boisterous, rude and dangerous conduct of persons at the pool without taking appropriate steps to control and prevent the same.

In that case, in an opinion written by Judge Hutcheson, the court said (at page 785):

> "* * * It goes without saying, in fact, it is not disputed, that proprietors of bathing pools owe to their patrons a duty to exercise due care, not only in providing a safe and proper place as such, but in policing and supervising the place to protect those coming there from wanton and unprovoked assault and injuries at the hands of other persons there. Especially is this duty laid upon proprietors with regard to women and children, to protect them from the rude, boisterous, and unprovoked attacks and assaults. The case made by plaintiff showed an egregious want of care, not only entitling her to go to the jury, but, if her testimony was believed, making a clear case for recovery. It showed her presence at the pool as a patron, entitled to be there; the presence there of other persons, invited to entertain and amuse those who, like plaintiff, came as paying guests; conduct of those persons, boisterous, rude, and dangerous to a degree, going on without let or hindrance, and with apparently no one there present to prevent it; that suddenly, and without warning, she was hurled into the pool by one of those persons, with resulting serious injury. Such evidence if believed made a clear case for recovery. It required the submission of plaintiff's case to the jury."

"The proprietor of a public indoor swimming pool was held in *Esposito v. St. George Swimming Club* (1932) 143 Misc. 15, 255 N.Y.S. 794, to be obligated to take precautions to avert injury when one patron dives before another emerges. The court said that since such proprietor solicits large numbers of people for profit he must be vigilant to protect them." Annot., 20 A.L.R. 2d 35 (1951).

"In *Murphy v. Winter Garden & Ice Co.* (1926, Mo. App.) 280 S.W. 444, the court held the owner of a skating rink liable for an injury sustained by a skater when she was pushed by one of several young men who had for some time previously

been attempting to trip and push girls who were skating, on the ground that the jury could find that the defendant had actual knowledge of the improper conduct of the two young men, since one of the girls informed an attendant of their conduct, and on the further ground that the jury could find that the defendant had constructive knowledge of their conduct in any event, since it was of such a nature as to have been noticeable to defendant's five attendants on duty. The court said that the standard of care by which the defendant's duty was to be measured was ordinary care under the circumstances, ordinary care always being a relative term. The interest of the case in connection with the present subject is heightened by the fact that the court held that, since negligence was the gist of the case, it was immaterial whether the young men purposely pushed the plaintiff or whether by their actions they merely created a menace to the proper conduct of the skating rink." Annot., 29 A.L.R. 2d 918 (1953).

"[W]here some boys had been throwing things around the theater, such as popcorn boxes and paper wads, and a boy attending the performance was struck in the eye by one of these objects, and there was evidence that no ushers had been on duty that day, and that the aisles were not being patrolled at the time of the injury, it was held that the theater operator could be found liable in *Pfeifer v. Standard Gateway Theater* (1951) 259 Wis. 333, 48 N.W. 2d 505, under the rule that when one assembles a crowd upon his property for purposes of financial gain to himself, he must use all reasonable care to protect patrons from injury from causes reasonably to be anticipated. In the exercise of this duty, said the court, it is incumbent upon the proprietor to furnish a sufficient number of guards or attendants to take necessary precautions, and whether the precautions taken were sufficient is ordinarily a question for the jury. The court noted that there was evidence as to how long the conduct of the boys had continued prior to the injury, and stated that such conduct should have attracted the attention of the attendants if there were attendants present, and that they in the exercise of reasonable care might have controlled this behavior so as to have prevented the injury. The court also held that it was not necessary for the plaintiff to establish what hit him and which of the other boys was responsible, the only direct testimony having been that of a companion who said that it was a spitball that hit the boy, the court stating that the law did not require every fact and circumstance which make up

a case of negligence to be proved by direct and positive evidence, and that proof of the fact of negligence may rest entirely in circumstantial evidence, where the circumstances are such as to take the case out of the realm of conjecture and within the field of legitimate inference." Annot., 29 A.L.R. 2d 919 (1953).

"[T]he court in *Hill v. Merrick* (1934) 147 Or. 244, 31 P. 2d 663, where the plaintiff, a girl of sixteen, while standing on the highdive platform, was bumped, or shoved off, by one of a group of boys playing on the platform within the view of the pool attendant, held that the defendant's failure to use reasonable care to furnish a reasonably safe pool and high dive, by permitting children to play on the steps and platform of the high dive, was negligence. The court further held that the evidence indicated that the proximate cause of the accident was the negligence of the defendant in permitting the children to play on the high dive and to jostle or push the plaintiff, and not an independent intervening act by a responsible third party. It was also held that the jury was warranted in finding that the plaintiff was not guilty of contributory negligence, since the evidence was uncontradicted that the plaintiff did not realize the danger to which she was subjected by reason of the lack of supervision and the dangerous condition which the defendant permitted to exist." Annot., 48 A.L.R. 2d 165 (1956).

"[T]he court in *Boardman v. Ottinger* (1939) 161 Or. 202, 88 P. 2d 967, where the plaintiff, while a patron at the defendants' swimming pool, was struck in the face with a ball which four young men in the pool were using for a game of catch, and which, according to testimony favorable to the plaintiff, was being thrown with great force, stated that the defendants' argument concerning a responsible, independent agency was without merit, since it was their duty to protect the plaintiff against injury from such an agency if, through the exercise of reasonable care, they could have discovered the wrongful conduct and taken the appropriate measures, and that if the players were throwing the ball with the violence described by the testimony favorable to the plaintiff, an inference was warranted that the defendants should have taken some precautions, and held that the trial court properly denied the motions for a nonsuit and a directed verdict." Annot., 48 A.L.R. 2d 165 (1956).

In the case at bar the horseplay or boisterousness was of such nature as to have been noticeable and attract the attention

of defendant's two lifeguards. It continued unabated for a minimum of twenty minutes. In the exercise of due care it should have been foreseeable to the lifeguards that such conduct was likely to cause injury to other patrons if allowed to continue, and, there was ample time to control such behavior.

Thus, the evidence permitted a finding that plaintiff was an invitee with the legal obligation on the defendant (1) to maintain the premises in a reasonable safe condition for the legitimate use of the invitee, (2) to exercise ordinary care to provide a sufficient number of competent attendants to supervise the bathers, and (3) police and supervise the place and protect patrons from injury at the hands of other persons there.

Since the owner owes such duty to its patrons, it clearly becomes a jury question as to whether in the instant case the proximate cause of plaintiff's injury did or did not arise through a breach of such duty.

I vote to reverse.

BEASLEY-KELSO ASSOCIATES, INC. v. EDWIN W. TENNEY, JR.

No. 763SC282

(Filed 6 October 1976)

1. **Brokers and Factors § 6— exclusive right to sell property — no right of owner to co-broker property**

A contract which granted a real estate agent "the exclusive right . . . to negotiate for the sale of and to sell" the described real property, required the owner to refer to the agent any and all inquiries received by the owner with respect to the property, provided that the agent could co-broker the property, and provided that the agent would be entitled to a 10% commission if the owner sold the property to a purchaser procured by the owner or any other source constituted an exclusive right to sell agreement, and a further provision that no commission was due in the event the property was sold by a real estate company of which the owner was president did not contradict the other provisions of the contract and give the owner the right to co-broker the property.

2. **Brokers and Factors § 6— exclusive right to sell property — sale by third party**

The evidence supported the court's finding that property which plaintiff agent had the exclusive right to sell was actually sold by a

third party real estate agent, not by the owner himself, and that plaintiff was entitled to a commission on the sale.

3. Brokers and Factors § 6— exclusive right to sell property — purchaser procured by third party — right to commission

Where a real estate listing agreement provided for a commission of 10% of the sales price if the property was sold by plaintiff agent or by someone other than the agent and a commission of only 5% if the owner referred the prospective purchaser to the agent, the agent was entitled to the full commission of 10% for the owner's sale of the property to a purchaser who was procured by a third party agent and who was not referred by the owner to plaintiff agent.

APPEAL by defendant from *Lanier, Judge.* Judgment entered out of session 9 December 1974 in Superior Court, CRAVEN County. Heard in the Court of Appeals 25 August 1976.

Defendant owned a 1154-acre tract of land in Pamlico County, which he had purchased in 1972. On 19 March 1974, he entered into a contract entitled "Exclusive Listing Agreement" with plaintiff, a real estate brokerage firm. The contract granted to plaintiff "the exclusive right, until noon 19 Sept., 1974, to negotiate for the sale of and to sell the real property" described for the price of $225 per acre. Other pertinent portions of the agreement are as follows (summarized except where quoted):

2. MARKETING: Agent (plaintiff herein) is to give owner the full benefit of its best judgment and advice with respect to the policy to be pursued in selling the property; list it with and solicit the full cooperation of the Multiple Listing Service of the New Bern Board of Realtors; advertise the property in such manner and such media as Agent might think would be most likely to engender the sale; take such further steps as in its judgment would enhance the sale of the property. Owner is to contribute nothing toward the cost of advertising and promotion.

3. REFFERALS: "During the term of this agreement, the Owner shall refer to the Agent any and all inquiries received by the Owner with respect to or concerning said property. The Agent shall diligently investigate each such inquiry as well as other inquiries or offers received or directed to the Agent and will use its best skills and efforts to procure a purchaser for such real property."

4. FEE FOR PROFFESSIONAL SERVICES: "The Agent shall receive from the Owner a fee of (10%) of the sales price payable in cash at the time of the final settlement . . . in either of the following contingencies:

. . .

(i) If during the terms of this agreement a purchaser ready, willing and able to purchase the property for not less than the sale price and otherwise upon the terms and conditions stated herein or any other price, terms and conditions acceptable to Owner is procured by the Agent alone or with the assistance of another broker, but only in the event a written contract of sale is entered into between the Owner and such purchaser, provided the failure to enter into such contract is not due to willful default or refusal on the Owner's part;

(ii) If during the term of this agreement the Owner sells, leases, transfers or exchanges, or enters into a contract of sale, lease or exchange with respect to said real property with any person or corporation whatsoever, irrespective of the terms and conditions of sale, lease, transfer or exchange, notwithstanding such person or corporation was not procured by the Agent but was procured by the Owner individually or through any other source, the Agent shall be entitled to a fee computed at the rates above mentioned upon the consideration received or to be received by the Owner. The aforesaid amount shall be deemed earned and shall be due and payable without demand as of the date of the lease, transfer or conveyance of the property."

"8. OTHER PROVISIONS:

(1) No commission in event Ed Tenney & Co. sells this property.

(2) Send owner all reasonable offers.

(3) Any referral by owner is on 5% commission."

Subsequent to the parties' entering into the agreement, and on 14 May 1974, defendant entered into an agreement entitled "Offer to Purchase" with one D. K. Appleton by which he agreed to sell the property to Appleton for a total consideration of $185,000, and on 28 May 1974, the parties closed the transaction. At the closing, one Maria Rich, a licensed real agent,

not employed by plaintiff or defendant, received a check in the amount of $9,250. Plaintiff was not paid any commission on the sale of the land and brought this action to recover commissions allegedly due under the contract between plaintiff and defendant. The matter was tried before the court without a jury. The court found facts and concluded that plaintiff is entitled to a commission of 10% of the sales price, or $18,500. Defendant appealed.

Ward, Tucker, Ward & Smith, P.A., by Michael P. Flanagan, for plaintiff appellee.

Levine and Stewart, by Michael D. Levine, for defendant appellant.

MORRIS, Judge.

Under G.S. 1A-1, Rule 52(a), the court, where the action is tried upon the facts without a jury, is required to find the facts and state separately his conclusions of law thereon. It is the province of the court, as the trier of facts, to determine the credibility of witnesses and the weight of their testimony and the reasonable inferences to be drawn therefrom. "If different inferences may be drawn from the evidence, he determines which reasonable inferences shall be drawn and which shall be rejected." *Knutton v. Cofield,* 273 N.C. 355, 359, 160 S.E. 2d 29, 33 (1968). Accord, *Hodges v. Hodges,* 257 N.C. 774, 127 S.E. 2d 567 (1962); *Laughter v. Lambert,* 11 N.C. App. 133, 180 S.E. 2d 450 (1971). The judge becomes both judge and jury, and his findings of fact have the force and effect of a jury verdict and, if supported by competent evidence, are conclusive on appeal even though the evidence might sustain findings and conclusions to the contrary. *Coggins v. City of Asheville,* 278 N.C. 428, 180 S.E. 2d 149 (1971); *Laughter v. Lambert, supra.*

We must, therefore, look at the findings of fact of the court against the evidence presented. The court first listed the undisputed facts, including the ownership by defendant of the property, the entering into of the agreement attached as Exhibit A and incorporated by reference in the judgment; the execution by defendant on 14 May 1974 of an offer to purchase which was delivered to defendant on 14 May 1974 by Maria G. Rich, a duly licensed real estate agent not an employee of Ed Tenney & Associates, Inc.; the conveyance of the land by de-

fendant on 28 May 1974 under the offer to purchase agreement; that the purchaser was represented at closing by an attorney; that Maria Rich was paid $9,250 commission as a result of the sale; that a closing statement was prepared by purchaser's attorney and that it showed a payment to Edwin Tenney, Jr., of $25,497.86 and that other than that disbursement and the check to Maria Rich, no other disbursements were made; that the provisions of the agreement between plaintiff and defendant entitled "Exclusive Listing Agreement" dated 19 March 1974 were the total and complete agreements between the parties; that defendant was president of Ed Tenney & Associates, Inc., during 1974 and was a duly licensed real estate broker in the State of North Carolina at all times material to this action; that the words "Ed Tenney & Co." in paragraph 8(1) of the contract refers to Ed Tenney & Associates, Inc., a corporation duly licensed as a real estate brokerage firm in North Carolina; that the purchase price paid for defendant's land was $185,000.

Facts found by the court from the evidence were as follows:

"4. That Edwin W. Tenney, Jr., and Beasley-Kelso Associates, Inc., are each entities with experience in the real estate listing and real estate sales fields, and that Edwin W. Tenney, Jr., is an officer of the North Carolina Real Estate Licensing Board.

5. That on or about March 19, 1974, Edwin W. Tenney, Jr., and H. E. Allen, an employee and salesman with Beasley-Kelso Associates, Inc., met in the offices of Beasley-Kelso Associates, Inc., New Bern, North Carolina, and at such date and place entered into the Exclusive Listing Agreement designated as plaintiff's pretrial 'Exhibit A.'

6. That subsequent to the execution of the agreement, employees of Beasley-Kelso Associates, Inc., attempted to procure a purchaser for said tract and obtained a written offer to purchase the tract from Charles H. Ashford and J. D. Harrah for a price of One Hundred Seventy-Three Thousand One Hundred Ninety Dollars ($173,190.00), a copy of said offer to purchase being plaintiff's trial 'Exhibit C'; that Edwin W. Tenney, Jr., was aware of the terms of the offer to purchase by Ashford and Harrah prior to the 14th day of May, 1974, and the said offer to purchase from

Ashford and Harrah was mailed to Edwin W. Tenney, Jr., prior to the 14th day of May, 1974.

7. That on or about May 12 or May 13, 1974, Maria G. Rich contacted Edwin W. Tenney, Jr., with respect to the 1,154 acre tract, inquired whether the same was available for sale and as to what the purchase price of the property would be; and that upon being informed of the terms of sale by Tenney, she then contacted Appleton with respect to this exact tract and that as a result of the contacts between Maria G. Rich and Edwin W. Tenney, Jr., Maria G. Rich obtained a written Offer to Purchase for the total price of One Hundred Eighty-Five Thousand Dollars ($185,000.00) from D. K. Appleton to Tenney, a copy of said Offer being plaintiff's pre-trial 'Exhibit B'.

8. That the Appleton Offer to Purchase was typed on a North Carolina Board of Realtors standard form No. 5, said form bearing the designation at the bottom thereof of 'Maria Rich Real Estate Company, Commercial-Residential-Farm Acreage'; that said Offer to Purchase provided in Paragraph 2 under 'Other Conditions' that 'a 5% commission is to be paid to broker by seller'; that Maria G. Rich executed said Offer to Purchase as escrow agent to acknowledge receipt of an earnest money deposit by Appleton and took a check made by Appleton for such deposit and the written Offer to Purchase to Edwin W. Tenney, Jr., at his Durham office on May 14, 1974; that the aforesaid Offer to Purchase was executed by Edwin W. Tenney, Jr., as seller.

9. That prior to meeting with Maria G. Rich on the 14th day of May, 1974, Edwin W. Tenney, Jr., had informed her that the Offer to Purchase signed by Appleton had to be in his office by noon on the 14th day of May, 1974, in order to be accepted by him because he was expecting an Offer to Purchase the property from someone else.

10. That the purchase of said property was closed and title was transferred from Edwin W. Tenney, Jr., to Appleton's assignee, Appleton Farms, Inc., in May 28, 1974, and that at said closing Maria G. Rich was present and received payment of Nine Thousand Two Hundred Fifty Dollars ($9,250.00) for her real estate commission fee, said money being deducted from the cash proceeds otherwise due Edwin

W. Tenney, Jr., and the only other disbursement made at such closing was to Edwin W. Tenney, Jr., as shown on plaintiff's trial 'Exhibit D'.

11. That Beasley-Kelso Associates, Inc., was not and has not been paid any real estate commission with respect to the transaction between Edwin W. Tenney, Jr., and Appleton and Appleton Farms, Inc.

12. That the Exclusive Listing Agreement between Edwin W. Tenney, Jr., and Beasley-Kelso Associates, Inc., provided that Beasley-Kelso Associates, Inc., would be the agent and would receive from Edwin W. Tenney, Jr., a fee of ten percent (10%) of the sales price at the time of settlement if during the term of the agreement Edwin W. Tenney, Jr., sold, transferred, or exchanged or entered into a contract of sale or exchange with any person or corporation whatsoever, irrespective of the terms and conditions of sale and 'notwithstanding such person or corporation was not procured by the agent (Beasley-Kelso Associates, Inc.) but was procured by the owner individually or through any other source.'

13. That an exception to the provision made reference to in the next above paragraph was that 'no commission in event Ed Tenney & Co. sells this property.'

14. That it is a normal and customary practice as an accommodation or courtesy in the real estate business when a real estate broker owns property and lists it with another broker for the owning broker to retain the right for himself and the real estate agency with which he is associated to sell the property, and that in such case, if the owning broker sells the property, there will be no commission due the listing broker.

15. That 'co-brokering', as that term is used in the real estate business, is the act of a listing and selling broker sharing a real estate commission, the listing broker having obtained the listing and the selling broker having found the prospect.

16. That 'co-brokering' is a normal, customary and usual practice in the real estate business only when the listing broker has the exclusive right to sell or an exclusive agency to sell the property with or without specified exceptions;

that Paragraph 2 of the Exclusive Listing Agreement not only allowed Beasley-Kelso Associates, Inc., to co-broker the property but required such co-brokering; that the Exclusive Listing Agreement did not give Ed Tenney & Associates, Inc., the right to co-broker the property.

17. That the usual and customary meaning of the word 'sell' as used in the real estate broker context is the bringing of a buyer and a seller together resulting in a contract.

18. That Maria G. Rich brought Appleton and Tenney together for the 1,154 acre tract of land which resulted in a contract between them which resulted in the sale of the property and transfer of title on May 28, 1975, which date was within the period specified in the Exclusive Listing Agreement.

19. That the Exclusive Listing Agreement provided that if at any time during the term of the agreement any person other than those excepted sold the property, Beasley-Kelso Associates, Inc., would be entitled to a fee of ten percent (10%) of the sales price of such sale, and Beasley-Kelso Associates, Inc., is entitled to ten percent (10%) of One Hundred Eighty-Five Thousand Dollars ($185,000.00), or Eighteen Thousand Five Hundred Dollars ($18,500.00).

20. That Beasley-Kelso Associates, Inc., did not breach any of the terms of the Exclusive Listing Agreement and carried out its obligations thereunder and that Beasley-Kelso Associates, Inc., brought this action in good faith to collect the commission due it and said action was brought without spite or ulterior motive."

Defendant excepted to that portion of No. 6 finding that the offer from Ashford and Harrah was mailed to defendant prior to 14 May 1974, and assigned this as error, but the assignment of error and exception on which it is based is not brought forward and argued by defendant in his brief. It is, therefore, deemed abandoned. *State v. Watson*, 287 N.C. 147, 214 S.E. 2d 85 (1975); *Knutton v. Cofield, supra.* Defendant also excepted to findings 12, 16, 17 and 19 and these exceptions are properly assigned as error and brought forward and argued by defendant.

[1] He discusses his exceptions to findings 12 and 16 together, and we shall do the same. These two exceptions raise the pri-

mary question involved in this appeal. By inserting the language contained in paragraph 8(1), did defendant reserve unto himself the right to co-broker the property? Defendant insists that that is the only interpretation to be given the contract. He concedes that if paragraph 4(ii) were alone applicable, p'aintiff would be entitled to a commission under the undisputed facts of this case. However, he strenuously urges that paragraph 8(1) contradicts and overrides paragraph 4(ii). We cannot agree. "A construction which neutralizes one provision should not be adopted if the contract is susceptible of another which gives effect to all its provisions." *DeBoer v. Geib,* 255 Mich. 542, 544, 238 N.W. 226 (1931).

This Court, in *Peeler Insurance & Realty, Inc. v. Harmon,* 20 N.C. App. 39, 200 S.E. 2d 443 (1973), recognized the distinction between an "exclusive agency" real estate listing agreement, which prohibits the owner from selling the listed property through the agency of another broker during the listing period, and an "exclusive right to sell" agreement (exclusive sales contract) which prohibits the owner from selling either personally or through another broker without incurring liability for a commission to the original broker. See *Carlsen v. Zane,* 261 Cal. App. 2d 399, 67 Cal. Rptr. 747 (1968). In *Peeler* this Court found the contract to be an "exclusive right to sell" agreement from language not nearly so strong and unambiguous as the contract before us. Here the language used was "[t]he Owner grants to the Agent the *exclusive right,* until noon 19 Sept. 1974, to negotiate for the sale of and to sell the real property" described. (Emphasis added.) It further required the owner to refer to the agent any and all inquiries received by the owner with respect to the property and provided that the agent could co-broker the property and that if the owner sold the property to a purchaser procured by the owner *or any other source,* the agent would be entitled to a 10% commission on the purchase price which would be due and payable without demand as of the date of conveyance of the property by the owner. The language of the contract to this point is unambiguous and clearly indicates an "exclusive right to sell" agreement.

Paragraph 8(1) does not, we think, contradict the other provisions of the contract. To give it the interpretation contended for by defendant would completely neutralize the provisions of paragraph 4(ii). It would seem beyond the realm of practicality that plaintiff would enter into a contract re-

quiring him to co-broker the sale of the property, pursue a course of advertising in the usual media, list it with the multiple listing service—all at no expense to the owner—if he were going to allow owner to co-broker the sale of the property at no commission to the plaintiff, original broker. To do so would afford the agent no protection whatever.

There was evidence that in the real estate business when a real estate broker owns property and lists it with another broker it is not unusual for the listing broker to grant to the owning broker the right to sell the property without paying commission to the listing broker. This was the subject of finding of fact No. 14 to which defendant did not except. There was evidence that this was the custom and practice in order to protect the salesman and employees of the owning broker and their clients.

There was also evidence that when this is done, there is no right in the owning broker to co-broker the sale of the property. Both parties to this contract were well versed in the custom and practices of real estate brokers. At defendant's direction, the provisions of paragraph 8 were written in longhand by plaintiff's employee and became a part of the contract. By those provisions, defendant retained the right to sell the land himself and also provided that in the event of a referral by owner, as was required by paragraph 3, the referral would be "on 5% Commission." Obviously, this did not contradict or neutralize paragraph 3. It simply gave the owner an additional right. We are of the opinion and so hold that there was ample competent evidence to support findings 12 and 16 and the inferences the court drew from the evidence with respect thereto.

[2] Defendant contends that if the contract did not give him a right to co-broker, he is not, nevertheless, liable for a commission to plaintiff, because he actually sold the property himself. Defendant does not except to the court's finding that Maria Rich brought the purchaser and defendant together for the sale of the tract and that a contract between them resulted from this contact "which resulted in the sale of the property and transfer of title on May 28th 1975, which date was within the period specified in the Exclusive Listing Agreement." Defendant does except to the court's finding that "the usual and customary meaning of the word 'sell' as used in the real estate broker context is the bringing of a buyer and a seller

together resulting in a contract," and to the court's conclusion that "within the period of said agreement the tract was sold by Maria G. Rich, a third party broker." There is ample evidence in the record that real estate brokers considered property sold when they had obtained "a contract on the property." Certainly it is the law in this State that when a real estate broker procures a purchaser who is accepted by the owner, and a contract is entered into between them, the broker has earned a commission even though the sale may not actually be consummated. *Harrison v. Brown,* 222 N.C. 610, 24 S.E. 2d 470 (1943), quoting 8 Am. Jur., Brokers, § 186, p. 1099. Additionally, the contract between plaintiff and defendant evidences their intent that the meaning of the word "sell" is the same as is included in the court's finding. In paragraph 4 of the contract, it was provided that plaintiff would become entitled to a commission for selling the property if, during the term of the agreement, "a purchaser ready, willing and able to purchase the property . . . upon the terms and conditions stated herein or any other price, terms, and conditions acceptable to Owner is procured by the Agent alone or with assistance of another broker, but only in the event a written contract of sale is entered into between the Owner and such purchaser . . . "

Maria Rich testified that she had a purchaser interested in that type of land but at that time did not know whether the Tenney property was listed and if so, with whom; that she had had prior dealings with that property many times previously; that she called defendant and told him she had a man she thought would buy the land for a certain price; that defendant told her what he would take; that she made 3 or 4 telephone calls that night, "back and forth on the phone, to Don Appleton and Ed Tenney and came up the next day with a contract and a check for $10,000.00." The contract was on her form. She testified: "I typed the contract up the night before I went to Ed's office, on my form; I told Ed that I was using the standard North Carolina Realtor's Offer to Purchase form." At defendant's office the next day, additional calls were made and additions were made to the contract. The closing was held in Bayboro at which time the purchaser, his attorney, Maria Rich, and defendant were present. Maria Rich received a 5% commission, based on the sales price of the property. She testified that she received only half the normal commission and considered herself to be a co-broker, defining co-broker as "someone that

is working with another broker." We think the evidence clearly supports the conclusion that Maria Rich sold the property.

[3] Finally defendant argues that the court erred in determining the amount of commissions due. He contends that, at most, defendant should be required to pay plaintiff a commission of 5%, the amount plaintiff would have received had defendant referred to plaintiff the prospective purchaser procured by Maria Rich. The undisputed fact is that defendant did not refer as required by the contract. While it is true the damages awarded in cases where exclusive broker agreements have been breached may be the full commission provided in the listing agreement, *Carlsen v. Zane, supra,* here the contract provides for the payment of a fee of 10% of the *sales price* in the event the property is sold by someone other than the agent. The parties entered into a stipulation that the sales price was $185,000. Normally the measure of damages for breach of contract is that amount which will put the parties in the same position they would have occupied had there been no breach. *Fulcher v. Nelson,* 273 N.C. 221, 159 S.E. 2d 519 (1968). The court correctly computed the amount due plaintiff by defendant.

Defendant has also brought forward and argued certain exceptions to the admission of testimony. We have examined all such exceptions and find that none constitutes prejudicial error.

Affirmed.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. EARL V. PURYEAR

No. 7610SC421

(Filed 6 October 1976)

1. Criminal Law §§ 73, 79— statements made by co-conspirators — no hearsay — admissibility

The trial court in a prosecution for conspiracy to assault a person with a deadly weapon did not err in allowing the victim of the assault to testify as to statements made by defendant, defendant's daughter and wife, and a co-conspirator immediately before and during the assault, since the question for resolution by the jury was not whether the statements were true, and the statements were therefore

not hearsay; moreover, the statements were admissible under the rule that if the State offers other evidence tending to show the existence of a conspiracy, the acts and declarations of each party to it in furtherance of the objectives of the active conspiracy are admissible against the others.

2. **Criminal Law § 15— motion to dismiss for improper venue — issue previously determined**

The trial court did not err in failing to grant defendant's motion to dismiss made on the ground of improper venue where the defendant filed a plea in abatement six months before his case was tried denying that the alleged offense took place in Wake County as alleged in the bill of indictment and moving that the case be removed to Johnston County, the judge held a hearing on the plea, denied it, and defendant took no exception to that order, and the evidence presented at the hearing on the plea was not brought forward in the record.

3. **Conspiracy § 7— conspirator acting under duress — propriety of instructions**

In a prosecution for conspiracy to assault a person with a deadly weapon where the assault victim testified that he had formed an impression to the effect that defendant's daughter's participation in the conspiracy was involuntary, the trial court's instruction as to what duress would excuse one from acting as a conspirator and negate the fact that one was a conspirator was proper.

4. **Criminal Law § 114— conspiracy to commit assault — instruction on taking law into one's own hands — propriety**

In a prosecution for conspiracy to assault a person with a deadly weapon where the evidence tended to show that the victim of the assault had sexual relations with defendant's daughter and shared drugs and alcohol with her, and defendant felt the victim should be punished for his immoral and illegal activities, talked of killing the victim, and assembled a squad of henchmen for the purpose of whipping defendant, the trial court's instruction that no person was "justified in taking the law in his own hands" or "in acting as judge, jury and executioner" was proper.

5. **Conspiracy § 8— imprisonment for two years — punishment within statutory limits**

Sentence of imprisonment for two years imposed upon defendant following his conviction for conspiracy to commit a simple assault was not in excess of that allowed by law, since conspiracy to commit a simple assault is a misdemeanor for which no specific punishment is provided by statute, and the crime is therefore punishable by fine or imprisonment for no longer than two years or both in the discretion of the court. G.S. 14-3(a).

APPEAL by defendant from *Bailey, Judge.* Judgment entered 14 November 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 14 September 1976.

The bill of indictment upon which defendant was convicted charged him with conspiracy to assault James Robert Dickens

with a deadly weapon and inflict serious injury upon him. The alleged co-conspirators were Tommie Puryear (his daughter), Ann Puryear (his wife) and other unidentified persons.

The State's evidence tended to show the following:

Defendant's daughter, Tommie Puryear, was a student at Ravenscroft High School. Dickens (who is over 30 years old) first saw Tommie Puryear in the summer of 1974 when she and one of her girl friends came to his apartment on Bashford Road in Raleigh. After their first meeting Dickens and Tommie continued an association that included sharing sex, alcohol and marijuana. Tommie Puryear was a willing participant in these activities. On occasions Tommie Puryear's sister, Toni, furnished the marijuana.

Defendant learned of his daughter's association with Dickens by reading her personal notes. He had also overheard telephone conversations between the two. On 12 February 1975, he telephoned a private detective who had formerly worked as a police officer. They met at a nearby shopping center where defendant explained the problems he was having with his daughter, Tommie Puryear. He asked the investigator to conduct a surveillance of his daughter's after-school activities. Thereafter they had several meetings. Defendant wanted him to find out what his daughter was doing after school. Dickens was not mentioned until, after several meetings, defendant gave him Dickens' name. On one occasion the investigator followed Tommie Puryear as she drove from an evening basketball game at the school to a local apartment complex where she met a man (not Dickens) and talked for about ten minutes.

On 12 March 1975, the investigator, after unsuccessfully attempting to follow Tommie Puryear, went directly to Dickens' apartment on Bashford Road. After waiting at the Dickens' residence for about one half hour, the investigator saw Tommie Puryear arrive. The investigator then called defendant and the two rode by the Dickens' apartment several times. Defendant was angry and made remarks about killing Dickens. He said that he was going to the apartment and whip Dickens. He wanted the investigator to accompany him. The investigator declined and urged defendant to go home and wait for his daughter to come home. Defendant said that he would get Dickens whipped. Defendant opened the trunk of his car and

showed the investigator a pistol, a pair of handcuffs, a rope and a leather whip about three feet long.

On 2 April 1975, at about 1:30 p.m., Tommie Puryear telephoned Dickens at his apartment and told him that her father was out-of-town and that her mother and brother were at a lake. She told Dickens that she had to go to Johnston County to study with a friend but that she would be back that night. She told Dickens that she would come to his apartment that evening between 7:30 and 8:30. Dickens was ill and was in bed when the call came.

Between 7:30 and 8:00 that night, Tommie Puryear again telephoned Dickens at his apartment. She told him that she was having car trouble and was stranded on a rural county road in Johnston County. She said she needed someone to come out there and help her. Dickens asked her if there was not someone else she could call. Tommie Puryear told Dickens that since her parents were out-of-town there was no one else for her to call for help. She then gave Dickens the directions he should follow to reach her. She told him to go about one half mile south of Clayton and then turn left on Highway 42. He was then directed to proceed on Highway 42 for 4 miles to a country store on the left of the highway.

Dickens then dressed and drove to Garner. He bought some gas and followed the directions Tommie Puryear had given him. After driving 4 miles on Highway 42 he saw a car stopped on the road with its parking lights on. Tommie Puryear was in the car and told him her headlights were shorting out. The headlight switch was only pulled halfway out. Dickens pulled the switch fully out and the headlights came on. Tommie Puryear again told him the headlights had been shorting out. Dickens got under the car and shook the wires to see if the lights would go out, and, as he did so, defendant appeared beside the car and announced, "I am Earl Puryear." Defendant told Dickens to go to a tractor disk that was about six feet from the car. Defendant then called out, "Ann, come out and see this S.O.B. that ruined our home." Defendant's wife, Ann Puryear, then came out from beside a nearby building and said that "she didn't want to see the S.O.B." Defendant then tossed the car keys to his wife and told her to take Tommie Puryear with her. Tommie Puryear told defendant, "to do what he had promised" and "to remember what he had promised." As soon as Ann and Tommie Puryear left, defendant, standing about five

feet away, pointed a pistol between Dickens' eyes. The pistol was leveled at Dickens with defendant's left hand supporting his right hand. He called, "Ya'll come on out." Upon this command, four men wearing ski masks came from behind Dickens, two on each side of the tractor disk. Defendant then ordered the masked men to "get him." The masked men were all armed with nightsticks eighteen inches long. Dickens started striking out at the assailants who began beating him about the head and face. Dickens was beat into a state of semiconsciousness. Dickens' arms were handcuffed behind his back, a chain was twisted behind his back and he was half dragged and half carried to a nearby implement shed. The men continued to strike him as he was being carried to the shed. After he was taken to the shed, Dickens' hands were handcuffed in front of him around the front end of a piece of farm machinery. Defendant then began to lash Dickens with a leather whip. The others hit him in the head with nightsticks. The men questioned him about his association with Tommie Puryear and his marital status and would beat him even harder when not satisfied with his answers. Dickens pleaded for his life. At one point defendant grabbed Dickens by the hair, jerked him around and cut a plug of hair out of his head saying, "You see how sharp the knife is. Do you know what I am going to do with it?" Defendant then told Dickens that he was going to use the knife to castrate him. Defendant and the others interrupted the beatings four or five times to conspire on what they should do with Dickens. He could hear them voting on whether he would be killed or castrated. After their conferences defendant and his confederates would return to Dickens and beat him for another fifteen or twenty minutes. Dickens heard one of the masked men say, "let's just hurry up, get this thing over with. That he had to get back to Wake Forest." On two occasions a Volkswagen automobile come on the scene and the assailants went out and talked to the driver. During the course of the series of his assaults on Dickens, defendant would take the whip and make him say whatever he wanted him to say. When Dickens would answer a question defendant would tell him that he was lying and strike him harder. He whipped him for leaving his father's business and made Dickens say that he was a "sorry S.O.B." Dickens admitted to defendant that he had sexual intercourse with his daughter and that he had given her alcohol and drugs. Dickens did not lose consciousness but was so beaten that he

lost strength in his arms and legs and could not stand. He was bleeding from his mouth and thought that he was going to die.

After about two hours defendant and the masked men stopped striking Dickens and, again, conferred with one another. Defendant came back to Dickens and told him that he had been out-voted and that he was going to have to let him go. Dickens' handcuffs were removed. Defendant told him to go home, jerk his phone out of the wall and leave. Defendant told Dickens to leave Raleigh and the State of North Carolina or defendant would have him killed. Dickens was then allowed to leave. He was able to reach a friend's apartment who helped clean his wounds and summoned a deputy sheriff who lived nearby. At that time Dickens had bruises and marks about his back, buttocks and lower legs. His face was bruised, his lips were swollen and there was a small puncture wound in the lower abdominal area. Because of the injuries, Dickens was unable to work for about one month.

Defendant offered no evidence.

The judge instructed the jury to return one of the following verdicts: (1) Guilty of conspiring to commit an assault with a deadly weapon inflicting serious injury as charged in the bill of indictment; or (2) Guilty of conspiring to commit a simple assault; or (3) Not guilty.

The jury returned a verdict of guilty of conspiring to commit a simple assault.

Judgment was entered imposing a sentence of two years, all except 180 days of which was suspended with defendant being placed on probation.

Attorney General Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.

Ragsdale, Liggett & Cheshire, by George R. Ragsdale and Peter M. Foley, for defendant appellant.

VAUGHN, Judge.

Defendant brings forward thirteen assignments of error grouped into nine arguments. The first two arguments are in support of six assignments of error wherein defendant contends that the judge erred in admitting what defendant contends is hearsay evidence. Defendant further contends that the

admission of the alleged hearsay evidence violated his constitutional right to confront the witnesses against him.

[1] The exceptions are to the testimony of Dickens when he was allowed:

1. To testify relative to the two telephone conversations he had with Tommie Puryear prior to being seized and scourged by defendant and his masked accomplices. The details of those conversations have been set out in our statement of the facts. In summary, Dickens testified that Tommie Puryear first called early in the afternoon and told him that her parents were away, that she was going to Johnston County and that she would return to Raleigh and meet him in his apartment that night. The second call was placed to Dickens at about the time she was to have met him at his apartment in Raleigh. In that conversation she represented that her car was disabled in an isolated rural area of Johnston County, that her parents were out-of-town and that there was no one else upon whom she could call for help. She gave him specific directions as to the route he should follow in order to reach her.

2. To testify that when he reached the prearranged site, Tommie Puryear told him that her lights had been shorting out.

3. To testify that defendant's wife, Ann Puryear, told defendant, after defendant had directed her to come out and look at Dickens, "she didn't want to see the S.O.B."

4. To testify that one of the masked men who was participating in the assault told defendant and the other assailants, "let's just hurry up, get this thing over with. That he had to get back to Wake Forest."

We hold that the court properly overruled defendant's objections to all of the foregoing evidence.

> " 'Evidence, oral or written, is called hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it. . . . ' Expressed differently, whenever the assertion of any person, other than that of the witness himself in his present testimony,

is offered to prove the truth of the matter asserted, the evidence so offered is hearsay. If offered for any other purpose, it is not hearsay." Stansbury, North Carolina Evidence, § 138.

The probative force of Dickens' testimony did not depend on the competency or credibility of any person other than himself. The factual questions for resolution by the jury were whether Tommie Puryear, Ann Puryear and the masked accomplice made the statements he testified he heard them make, not whether the statements were true.

If the jurors believed Dickens' testimony they could find that the statements by the alleged co-conspirators were acts incriminating *them* as members of an active conspiracy and that those acts were in furtherance of the conspiracy. Dickens was the witness whose truthfulness was at issue. The jury could hear his words and observe his demeanor. Defendant was given the opportunity to confront the witness and test his credibility in the crucible of cross-examination. The confrontation clause of the Constitution was, therefore, not transgressed.

If the State offers other evidence tending to show the existence of a conspiracy, the acts and declaration of each party to it in furtherance of the objectives of the active conspiracy are admissible against the other members. *State v. Conrad,* 275 N.C. 342, 168 S.E. 2d 39.

There is ample evidence in the record from sources other than the declarations of the alleged co-conspirators to show the existence of a conspiracy at the time the declarations were made. That evidence includes the following: Defendant was angry with Dickens over his association with Tommie Puryear and has made remarks about killing him. At that time he was carrying a pistol, a pair of handcuffs, a rope and a leather whip in the trunk of his car. Defendant said he "would get" Dickens. Thereafter, at night, defendant, his wife, his daughter and four masked men are shown to be together in an isolated rural area of Johnston County. When Dickens appeared, defendant called for his wife to "come out and see this S.O.B. that ruined our home." Tommie Puryear begged her father to "do what he promised." Defendant called for the masked men, "Ya'll come on out" and then directed the men to "get him." Defendant and the masked group, armed with a pistol, a knife, a whip and nightsticks then proceeded to assault Dickens. Dur-

ing the course of the assaults, reference was made to Dickens' association with Tommie Puryear and the group held several conferences on whether to kill or castrate Dickens. It is a manifest understatement to say only that the foregoing constitutes some evidence that defendant had agreed with one or more of the others that the assault would take place. It is probably only rarely that such direct, clear and convincing evidence is available to point so unerringly to the existence of a conspiracy. Generally, they must be proven by a number of indefinite acts which, standing alone, mean little but when put together permit a reasonable inference that a conspiracy has been formed. Former Chief Justice Stacy once gave this example:

> "If four men should meet upon a desert, all coming from different points of the compass, and each carrying upon his shoulder a plank, which exactly fitted and dovetailed with the others so as to form a perfect square, it would be difficult to believe they had not been previously together. At least it would be some evidence tending to support the inference." *State v. Lea,* 203 N.C. 13, 164 S.E. 737.

For the reasons stated, defendant's assignments of error Nos. 1, 2, 3, 4, 5, and 13 are overruled.

[2] In his seventh assignment of error defendant argues that the trial judge committed prejudicial error in failing to grant his motion to dismiss on the grounds of improper venue. The motion was orally made and denied when the case was called for trial and again denied at the close of the evidence.

The record discloses that on 8 May 1975, defendant filed a plea in abatement wherein he denied that the alleged offense took place in Wake County as alleged in the bill of indictment and also moved that the case be removed to Johnston County. A hearing was held. On 28 May 1975, Judge Lee entered an order denying defendant's plea in abatement. No exception was taken in that order. The evidence presented at the hearing on the plea is not brought forward. It is, therefore, presumed that the proceeding was free from error and that Judge Lee properly denied defendant's motion. *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44. The issue having been resolved by Judge Lee in May, Judge Bailey properly declined to overrule Judge Lee's decision when the case was called for trial in November. The assignment of error is overruled.

In his sixth assignment of error defendant contends that the court erred in overruling his motion to dismiss because of the insufficiency of the evidence. As we have previously indicated, it is our opinion that the evidence was sufficient to take the case to the jury. Defendant particularly urges that there was insufficient evidence to show that the conspiracy was formed in Wake County or that any act in furtherance of the conspiracy took place in Wake County. The Superior Court of Wake County had jurisdiction over defendant and the alleged offense. The question of venue, as we said before, was settled when Judge Lee denied defendant's plea in abatement and it was not necessary to relitigate that issue at trial. Defendant, having failed to except to Judge Lee's order is in exactly the same position he would have been had he failed to raise the question of improper venue in the fashion and time required by statute. The question of venue is not an issue for trial after the jury has been empaneled. *State v. Dozier,* 277 N.C. 615, 178 S.E. 2d 412; *State v. Outerbridge,* 82 N.C. 617. For these same reasons any possible error (which we do not concede) in the judge's instruction that the making or receiving of a telephone call in Wake County would be an act occurring in Wake County is rendered harmless. Defendant's eighth assignment of error is, therefore, overruled.

[3] Defendant's ninth assignment of error is also directed to a portion of the judge's charge. On cross-examination defendant elicited testimony from Dickens that he had formed an impression to the effect that Tommie Puryear's participation in the conspiracy was involuntary. In the portion of the charge to which defendant excepts the judge instructed the jury as to what duress would excuse one from acting as a conspirator and negate the fact that one was a conspirator. Defendant contends that the court entirely misconstrued the nature of the offense for which defendant was being tried. In his brief he argues:

> "The trial Court confused and combined the issues of whether Tommie Puryear was acting under duress (an issue which was completely immaterial to this trial) with whether there was an unlawful concurrence between the defendant and his daughter to perform an unlawful act—assault James Robert Dickens."

Defendant concedes that in order to constitute a defense to a substantive criminal charge "the coercion or duress must be

present, imminent or impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done." Defendant argues, nevertheless, that:

> "It must be restated, however, that the defendant was not on trial for the substantive crime of assault, and neither was Tommie Puryear. The question of whether Tommie Puryear feared serious bodily harm could only be relevant if SHE were on trial for a substantive crime and its insertion into its case served only one purpose—to confuse the jurors as to the definition and requirements of proof of a conspiracy."

We believe defendant is mistaken. There is no difference in the degree of criminal intent (or coercion that would negate that intent) required in a prosecution for conspiracy to assault than that required in a prosecution for assault. The same may be said with reference to Tommie Puryear's participation in the conspiracy with defendant. Unless it could be excused (by reason of her having acted under duress) in a prosecution against her, it could not be excused as a defense in a prosecution against defendant for the same conspiracy. The assignment of error is overruled.

Defendant's tenth assignment of error is overruled. A contextual reading of the entire charge does not support the laborious argument brought forward to support the alleged error.

[4] The part in parenthesis in the following portion of the charge is the subject of defendant's eleventh assignment of error.

> "Now, Ladies and Gentlemen of the Jury, you should not decide this case upon the basis of your own standard of morals, nor upon what you might like the law to be.
>
> (No person is justified in taking the law in his own hands. No person is justified to constitute himself the keeper of the morals of his fellowman. No person is justified in acting as judge, jury and executioner. You should not decide this case upon the basis of sympathy for anyone, nor upon the basis of anger at anyone. You should decide this case upon the basis of the law that I have given you and the facts as you find them to be.)"

There was evidence in the record tending to show: Defendant felt Dickens should be punished for his immoral and illegal activities. He talked of killing Dickens. He said he would have him whipped. He organized and assembled a squad of henchmen for that purpose. He extracted confessions of crime and misconduct while Dickens was under the lash. Votes were taken on whether he should be killed or mutilated. The panel, apparently against defendant's vote, decided to free Dickens after the scourging. In short, the evidence tended to show that defendant did attempt to take the law into his own hands and act as judge, jury and executioner. In the trial of a criminal case, not every right must run in favor of the accused. Simple justice required that the jury be reminded that notwithstanding the absolutely reprehensible conduct of Dickens, that conduct could not excuse defendant's alleged unlawful attempt to summarily try and punish him for his wrongs. The exception is without merit.

[5] In his final assignment of error defendant contends that the sentence imposed is in excess of that allowed by law. Defendant argues that the punishment cannot exceed thirty days, the maximum provided for a conviction of simple assault. Defendant is mistaken.

Conspiracy to commit a simple assault is a misdemeanor for which no specific punishment is provided by statute. The crime is, therefore, punishable by fine, by imprisonment for a term not exceeding two years, or by both in the discretion of the court. G.S. 14-3(a).

We find no prejudicial error in defendant's trial or in the judgment entered.

No error.

Chief Judge BROCK and Judge MARTIN concur.

N. C. MONROE CONSTRUCTION COMPANY v. HENRY COAN, CHARLES D. FLOYD, AND RALPH JONES

No. 7618SC260

(Filed 6 October 1976)

1. Accord and Satisfaction § 2— bar to breach of contract claim

Accord and satisfaction is a bar to the assertion of any claims on the underlying contract and would preclude defendants from asserting claims for breach of such contract.

2. Accord and Satisfaction § 1— jury question — summary judgment

Normally, the existence of an accord and satisfaction is a question of fact for the jury, but where the only reasonable inference is its existence or non-existence, accord and satisfaction is a question of law and may be adjudicated by summary judgment when the essential facts are made clear of record.

3. Accord and Satisfaction § 1— dispute as to amount due

Accord and satisfaction may result where there is a dispute as to the amount actually due followed by payment of something less than or different from the amount claimed.

4. Accord and Satisfaction § 1— summary judgment

The trial court properly entered summary judgment for plaintiff on the issue of accord and satisfaction where plaintiff's evidence and defendants' admissions showed that plaintiff completed a motel project for defendants, there was a dispute as to the amount due plaintiff, an agreement was reached whereby defendants would execute two notes and plaintiff would execute an affidavit acknowledging payment in full and waiving its materialman's and mechanic's liens, and the notes were given in full satisfaction of the original debt, and where defendants' affidavit amounted to a mere denial that problems concerning the motel project had been resolved.

5. Accord and Satisfaction § 1— execution of notes — consideration

Plaintiff contractor's execution of an affidavit acknowledging payment in full for a construction project and waiving its right to file mechanic's or materialmen's liens constituted sufficient consideration for notes given by defendant in settlement of a dispute as to the amount remaining due for the project.

6. Duress— threat to breach contract

Defendants' assertion that they executed two notes to plaintiff in settlement of a dispute as to the amount remaining due for a motel construction project because plaintiff "implicitly" threatened to discontinue work on two other projects was insufficient to raise a genuine issue of fact as to duress as a defense to the notes.

APPEAL by defendants from *Seay, Judge.* Judgment entered 5 February 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 24 August 1976.

Plaintiff, a construction firm, and defendants, developers, entered a contract on 25 August 1972 for the construction of a motel (hereafter "the project") in Charleston, South Carolina. The contract called for a guaranteed maximum cost of $1,412,-170.00. Plaintiff promised completion of the project by 1 June 1973. The project was completed in September 1973, and defendants went into possession. At this time plaintiff was also engaged in two other large construction projects for defendants.

Upon completion of the project in September 1973, plaintiff and defendants met in Myrtle Beach, South Carolina, to discuss the project and its problems. Among the items discussed were the amount remaining due to plaintiff and plaintiff's claims for extras above the contract price. As a result of the discussions, defendants agreed to pay to plaintiff $128,239.00 by certified check and to execute two promissory notes payable to the order of plaintiff in the amounts of $100,000.00 and $89,715.53 respectively. Plaintiff agreed to execute and deliver to defendants an owner's and contractor's affidavit acknowledging payment in full and waiving any lien rights in the project. The notes and owner's and contractor's affidavit were subsequently executed and delivered by the respective parties.

Defendants failed to pay the notes when due. Plaintiff filed suit on 4 March 1975 alleging execution of the notes and failure to pay. Defendants answered and counterclaimed claiming breach of contract for delay in completion and exceeding the maximum guaranteed cost. Defendants also raised as defenses failure of consideration and duress. Plaintiff's reply raised as affirmative defense to the breach of contract a claim of accord and satisfaction, claiming that the agreement of September 1973 was complete and total satisfaction of all of the parties' obligations on the contract and further that defendants were estopped from asserting the contract claims. The parties entered into discovery, with plaintiff requesting admissions.

On 8 August 1975 plaintiff moved for summary judgment under Rule 56 presenting in support of the motion the affidavit of N. C. Monroe, president of N. C. Monroe Construction Company. Defendants submitted an affidavit in opposition to the motion. Judge Seay granted summary judgment for the plaintiff on 5 February 1976. In granting summary judgment, he found the following facts, *inter alia,* to be undisputed:

> "2. The project called for in the documents (hereinafter the 'Charleston Project') was constructed by the

plaintiff, and defendants took occupancy thereof in early September, 1973. Subsequently in late September, 1973, representatives of the plaintiff met with the defendants at Myrtle Beach, South Carolina, at which meeting the Charleston Project and sums due for construction thereof were discussed. Defendants contend that during the course of that settlement meeting, there was a dispute between the defendants and the plaintiff as to the amount of money owing to the plaintiff under the contract and for the construction of the project.

"3. At such meeting, an agreement was reached whereby the defendants agreed to deliver to the plaintiff $128,239.00 by means of a certified check and two notes in the amounts of $100,000 and $89,715.53, which notes are the subject of this action. As part of such agreement, plaintiff was to execute an Owner's and Contractor's Affidavit acknowledging payment in full for construction of the project and waiving its mechanics lien against the project in order for the defendants to obtain permanent financing on the Charleston Project as constructed.

"4. Subsequent to the September, 1973, meeting, and in compliance with the agreement reached thereat, defendants executed the notes which are the subject of this action. Said notes are dated September 10, 1973, one being in the amount of $100,000 with interest at the rate of 9% per annum payable on or before June 10, 1974, and the other in the amount of $89,715.53 with interest at the rate of 9% per annum payable on demand, copies of which are attached to plaintiff's Complaint. The afore-described notes were delivered by the defendants to the plaintiff along with a certified check in the amount of $128,239. Pursuant to the agreement reached at the September, 1973, meeting and in return for the notes and certified check, plaintiff executed the Owner's and Contractor's Affidavit, a copy of which is attached to plaintiff's Reply, thereby acknowledging payment in full of all sums due under the contract for construction and waiving its lien against the project. The Owner's and Contractor's Affidavit was subsequently completed and furnished to the title insurance company by the defendants in order to obtain permanent financing on the Charleston Project.

"5. The making and delivery of the two notes which are the subject matter of this action by defendants was outside of the scope of the contract between plaintiff and defendants for the construction of the Charleston Project, since such contract did not provide for or require the defendants to make and deliver such notes.

"6. Plaintiff held the two notes which are the subject of this action until July 11, 1974, at which time the plaintiff sent a letter to the defendants inquiring as to when payment could be expected on the notes. In reply thereto, defendants informed the plaintiff that they were experiencing difficulties in obtaining funds to make payment on the notes due to the recessionary period which had struck the motel market and due to the difficulty in finding secondary financing on the project because of the tightness of the money market. Defendants also informed the plaintiff that they were constantly attempting to get secondary financing for the project so that the notes could be paid.

"7. After the inquiry of July 11, 1974, and response from the defendants, there were frequent telephone conversations between representatives of the plaintiff and the defendants dealing with payment of the notes and the difficulties being experienced by the defendants in obtaining additional financing so that the obligations could be satisfied. At no time during these conversations did the defendants raise the question of delay in construction or cost of the project. The sole issue discussed was how the defendants were to obtain the funds to satisfy the notes."

Judge Seay then concluded as follows:

"1. There is no genuine issue as to any material fact, and the plaintiff is entitled to a judgment on all issues as a matter of law."

* * *

"3. There was consideration for the making and delivery of the notes, since the making of such notes resulted directly from the amount remaining due on the underlying obligations on the construction contract for the Charleston Project, and since plaintiff furnished the defendants with an Owner's and Contractor's Affidavit in return therefor. By means of the Owner's and Contractor's Affidavit, plain-

tiff waived its legal rights and remedies by acknowledging payment in full for the construction called for in the contract and waived its rights and interest in the construction project, including the right to file and perfect its mechanic's lien under the laws of South Carolina. Defendants used such Owner's and Contractor's Affidavit for their benefit by completing and furnishing it to the title insurance company in order to obtain permanent financing on the project as constructed.

"4. The agreement between the plaintiff and the defendants at the September 19, 1973, meeting in Myrtle Beach, South Carolina, whereby the plaintiff was to receive a certified check for $128,239 along with notes in the amounts of $100,000 and $89,715.53 in return for plaintiff's acknowledgment of payment in full and waiver of lien in the form of the Owner's and Contractor's Affidavit, constitutes a full and complete settlement of the underlying obligations arising from the contract for construction and the actual construction pursuant thereto. The defendants and plaintiff performed the September, 1973, agreement by defendants' delivery to plaintiff of a certified check in the amount of $128,239 and the two notes in the amounts of $100,000 and $89,715.53 which are the subject of this action, and by plaintiff's delivery of the Owner's and Contractor's Affidavit to the defendants. The making of the September 1973 agreement along with the performance thereof constitutes an accord and satisfaction of all obligations, disputes and matters arising from the contract for construction of the Charleston Project. Accordingly, all matters relating to the construction contract and all matters relating to the construction of the Charleston Project have been resolved, and all defenses relating to the underlying construction contract and the actual construction, including the defenses raised by the defendants of delay in completion and excessive cost of construction, cannot now be asserted.

"5. Plaintiff relied upon the conduct of the defendants at the September, 1973 meeting and the subsequent delivery of the certified check and the notes, and in return therefor acknowledged full payment of all obligations due for construction of the project, and waived its lien rights thereon. At the time of the September, 1973 meeting and

at the time of the delivery of the Owner's and Contractor's Affidavit, defendants should have been aware of the defenses they have asserted relating to delays in construction and excessive cost. By accepting the Owner's and Contractor's Affidavit and using such document to their benefit, and by allowing the plaintiff to act to its detriment relying on defendants' tender of two notes, the defendants waived their rights to assert defenses to the construction contract, and are estopped from any such assertion."

* * *

"7. No genuine issue of fact has been raised as to any duress in the making of the notes which would constitute a defense to this action."

From this judgment defendants appeal.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Hubert Humphrey and Michael D. Meeker, for plaintiff.

Dees, Johnson, Tart, Giles & Tedder, by J. Sam Johnson, Jr., for defendants.

BROCK, Chief Judge.

Defendants' appeal raises the procedural issue of whether summary judgment was properly granted as to any or all issues in the dispute between these parties.

[1] Defendants contend that Judge Seay erred in finding no genuine issue as to the material fact of accord and satisfaction. The breach of contract alleged by defendants in their answer can be a valid defense to payment of the notes. *Stelling v. Trust Co.*, 213 N.C. 324, 197 S.E. 754 (1938). In order to avoid defendants' defense and counterclaim, plaintiff alleged the affirmative defense of accord and satisfaction. If proven, accord and satisfaction is a bar to the assertion of any claims on the underlying obligation and thus would preclude defendants from asserting their breach of contract claims. *Bizzell v. Bizzell*, 247 N.C. 590, 101 S.E. 2d 668, *cert. den.* 358 U.S. 888, 3 L.Ed. 2d 115, 79 S.Ct. 129, *reh. den.* 358 U.S. 938, 3 L.Ed. 2d 310, 79 S.Ct. 322 (1958).

[2] In this case the plaintiff has the burden of proof on accord and satisfaction. Moreover, as movant for summary judgment under Rule 56, plaintiff has the added burden of

showing no genuine issue as to the existence of an accord and satisfaction. Normally, the existence of an accord and satisfaction is a question of fact for the jury. But where the only reasonable inference is existence or non-existence, accord and satisfaction is a question of law and may be adjudicated by summary judgment when the essential facts are made clear of record. 1 Am. Jur. 2d, Accord and Satisfaction, § 53, p. 352.

The record before Judge Seay consisted of the following: plaintiff's verified complaint, defendants' unverified answer and counterclaim, plaintiff's verified reply to the counterclaim, stipulations, admissions, plaintiff's affidavit in support of summary judgment, defendants' affidavit in opposition, and documentary exhibits including the contract, notes, and owner's and contractor's affidavit. From these materials it is clear that the project was completed in September 1973. There was a meeting of the parties to discuss the problems with the project, and there was a dispute as to the amount due the plaintiff. An agreement was reached whereby defendants agreed to execute the notes. In return plaintiff agreed to execute an owner's and contractor's affidavit which acknowledged complete payment by the defendants. These instruments were subsequently executed and delivered, and defendants went into possession of the project. Plaintiff alleges these transactions constituted an accord and satisfaction. Defendants admit agreeing to the execution of the notes but contend that there was no resolution of the problems or complete acceptance.

[3] Accord and satisfaction may result where there is a dispute as to the amount actually due followed by payment of something less than or different from the amount claimed. *Products Corporation v. Chestnutt,* 252 N.C. 269, 113 S.E. 2d 587 (1960); 1 Am. Jur. 2d, Accord and Satisfaction, § 27, p. 325. In the case at bar defendants, by their own affidavit, admit that at the September meeting the amount remaining due was disputed. Yet they agreed to execute the notes in issue.

[4] Whether or not there is an accord and satisfaction upon the delivery and acceptance of a debtor's note depends on the intent of the parties. "If the agreement is that the note shall be received in satisfaction and discharge of the original debt or claim, and the note is actually delivered, an accord and satisfaction will result regardless of whether the note was paid." 1 Am. Jur. 2d, Accord and Satisfaction, § 48, p. 345. That the

notes were given in full satisfaction of the original debt is clearly established by the owner's and contractor's affidavit:

> "All of the persons, firms, and corporations except those whose names, if any, appear on the Waiver of Liens on the reverse side hereof, including General Contractor and all subcontractors, who have furnished services, labor, or materials, according to plans and specifications or extra items, used in the construction or repair of such improvements, *have been paid in full,* that there are no mechanics' or materialmen's liens against said property and no claims outstanding which would entitle the holder thereof to claim a lien against the property (except those claims, if any, which are waived by the Waiver of Liens on the reverse side hereof) and *that such construction or repair has been fully completed and accepted by the owner. General Contractor hereby waives and releases his right to file a mechanic's or materialmen's lien against said property . . .* " (Emphasis added.)

This owner's and contractor's affidavit was executed and delivered to defendants in return for the delivery and execution of the notes. Plaintiff clearly accepted the notes as a complete resolution of claims, even to the extent of waiving its lien rights. Defendants are careful in their afidavit not to deny that the owner's and contractor's affidavit was given in return for the notes. They merely say "[t]hat the owner's and contractor's affidavit spoken of in the affidavit of N. Carl Monroe was not given in consideration for the notes sued upon in this action." Whether or not the giving of the owner's and contractor's affidavit was consideration is a question of law, and defendants' statement is thus a conclusion of law. Regardless of defendants' statement, they wanted the contractor's affidavit and relied on it as evidence that the contract had been completed. This is seen in defendants' admission that they received the contractor's affidavit and subbmitted it to their lender to secure permanent financing.

Plaintiff's showings coupled with defendants' admissions are clearly sufficient to show an accord and satisfaction. Defendants claim, however, that since they filed an affidavit opposing summary judgment, in which they stated on personal knowledge that no resolution of the dispute or complete acceptance had occurred, then the existence of an accord and satisfaction was sufficiently put in issue.

Our Supreme Court has held that the movant for summary judgment with the burden of proof should lose if the opposing party introduces materials showing a clearly disputed issue of fact. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). But *Kidd v. Early* also says that in order to resist a motion for summary judgment, it is encumbent upon the opposing party "to show that he has, or will have, evidence sufficient to raise an issue of fact." *Id.* at 370, 222 S.E. 2d at 410. Rule 56 does not contemplate the use of affidavits merely to deny allegations in the pleadings.

Plaintiff's affirmative defense of accord and satisfaction was first raised in its reply to defendants' answer and counterclaim. Since there were no further pleadings required in the case, defendants' first opportunity to attack the defense was in their affidavit in opposition to the motion. In that affidavit defendants simply denied any resolution of the problems concerning the project. This amounts to a mere denial of the allegations of plaintiff's responsive pleading and does not allege particular or precise facts showing in what way or to what extent plaintiff breached the contract or in what way the defendants pressed their objections. Furthermore, in none of the materials properly before Judge Seay do defendants attempt to controvert plaintiff's showing that at no time from the execution of the notes until suit some year and one-half later did the defendants deny their obligation on the notes by reason of plaintiff's breach. On the contrary, defendants consistently communicated to plaintiff that their failure to pay was due only to difficulty in obtaining the needed money.

Defendants have failed to show that they have or will have evidence sufficient to raise an issue of fact. The only possible inference to be drawn from the materials before Judge Seay was that an accord and satisfaction had been reached. Summary judgment for plaintiff was therefore appropriate on the issues of accord and satisfaction and defendants' breach of contract claims.

[5] Defendants raised as a second defense to the notes failure of consideration. Judge Seay found correctly that an accord and satisfaction existed. Thus, defendants received the owner's and contractor's affidavit in return for the notes. By that instrument plaintiff admitted being fully paid on the underlying obligation and also waived its rights to file and perfect mechanic's

and materialmen's liens. The Court, in *Bumgardner v. Groover,* 245 N.C. 17, 95 S.E. 2d 101 (1956), held:

> "Undoubtedly, the release or waiver of a legal right, or a forebearance to exercise a legal right, is a sufficient consideration to support a note made on account of it."

That the lien waiver constituted value to the defendants is evidenced by their admission of using the owner's and contractor's affidavit to obtain permanent financing.

[6] Finally, the defendants assert duress as a defense to the notes. They allege in their unverified pleading and in their affidavit that they were forced to agree to and later execute the notes because plaintiff "implicitly" threatened to discontinue work on two other contracts. A threat to breach a contract does not constitute duress unless the remedy afforded by the courts is inadequate. *Smithwick v. Whitley,* 152 N.C. 369, 67 S.E. 913 (1910). Further, a threatened breach of contract is not coercive unless the failure to perform as promised would result in irreparable injury to business. 13 Williston on Contracts, § 1617 (3d ed. 1970). Finally, G.S. 1A-1, Rules 8 and 9 require that allegations of duress be stated with particularity.

Nowhere in defendants' pleadings or affidavit are coercive circumstances alleged or described other than the bare statement that the "defendants were implicitly threatened by the plaintiff with discontinuation" of two other projects. Nowhere do defendants allege inadequate remedies at law or irreparable damage. Defendants have failed to raise a genuine issue of fact as to any duress which would constitute a defense.

It appears that the trial court erred in its computation of interest due on the two notes. Therefore, that part of finding of fact number 9 which determines the interest due; that part of conclusion of law number 2 which concludes the amount of interest due; and that part of the judgment in excess of the total principal sum of the two notes are vacated. Judgment for the principal sum of the two notes ($189,715.53) is affirmed. The cause is remanded to the superior court for a hearing and determination of the interest due on the two notes from their dates

(10 September 1973) until the date of judgment (5 February 1976).

Affirmed in part.

Vacated in part and remanded.

Judges PARKER and ARNOLD concur.

FOREMOST INSURANCE COMPANY v. JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE FOR THE STATE OF NORTH CAROLINA. (IN THE MATTER OF ESTABLISHING APPROPRIATE INSURANCE PREMIUM DISCOUNTS FOR ADEQUATE MOBILE HOME TIE-DOWNS; ORDER OF THE COMMISSIONER ENTERED OCTOBER 31, 1975)

No. 7610SC331

(Filed 6 October 1976)

1. **Insurance § 116— mobile home insurance — tie-down discount — conclusions not supported by findings**

Findings of fact of the Commissioner of Insurance did not support the Commissioner's conclusions of law in an order allowing a tie-down credit of 10% of the total premium for each of the various types of mobile home insurance.

2. **Insurance § 116— mobile home insurance — tie-down discount — necessity for findings of fact**

In enacting the statute which "authorized and directed" the Commissioner of Insurance to implement not less than a 10% discount on mobile home insurance premiums for proper mobile home tie-down, the General Assembly intended that the size of the discount be determined only after compliance with the procedures and standards contained in Article 13 of G.S. Chapter 58; therefore, the Commissioner must make findings of fact supported by substantial evidence in determining the amount of the discount. G.S. 58-131.3A.

3. **Insurance § 116— mobile home insurance — tie-down discount — applicability to windstorm portion of premium**

The statute authorizing a discount of not less than 10% from the premium "otherwise applicable" for mobile home insurance when the mobile home is tied down in accordance with the North Carolina State Building Code standards or any other standard "approved by the Commissioner and which affords no less protection from windstorm damage," G.S. 58-131.3A, does not permit a discount of not less than 10% of the entire premium but permits a discount only as to the portion of the premium relating to windstorm losses.

Judge VAUGHN dissenting.

APPEAL by petitioner, Foremost Insurance Company, from *Hall, Judge.* Judgment entered 11 February 1976. Heard in the Court of Appeals 1 September 1976.

On 12 August 1975, the Commissioner of Insurance, John Randolph Ingram (hereinafter called "Commissioner"), issued pursuant to G.S. 58-131.2 a "Notice of Public Hearing" to be held 16 September 1975 " . . . for the purpose of establishing appropriate insurance premium discounts for adequate mobile home tie-downs, pursuant to Chapter 670 of the 1975 Session Laws of North Carolina." This action was taken in response to House Bill 343, included in Chapter 670 of the 1975 Session Laws of North Carolina, which has been codified as G.S. 58-131.3A and provides as follows:

> "The Commissioner is authorized and directed to implement not less than a ten percent (10%) discount from the insurance premium otherwise applicable to be allowed in diminution of the premium charged insureds under mobile-home owner policies and mobile-homeowner's policies where the mobile home covered by the policy has been properly secured in accordance with regulations of the North Carolina State Building Code Council as approved by the Commissioner or any other standard which is approved by the Commissioner and which affords no less protection from windstorm damage than the aforesaid regulations."

On 10 September 1975, in response to the Commissioner's notice, the North Carolina Fire Insurance Rating Bureau (hereinafter called "Rating Bureau") filed with the Commissioner revisions in the rules for tie-down credit for each of the various types of mobile home insurance policies. In each revision, the Rating Bureau recommended a reduction of 10% of the total premium and stated:

> "At present credible experience is not available to substanstiate any credit for tie-downs under this Program. Furthermore, it should be noted that the proposed credit of 10% is to be applied to the applicable basic premiums for coverages which encompass many other exposures . . . other than wind. Therefore, we strongly feel that the proposed tie-down credit is fully adequate under present circumstances."

On 16 September 1975, hearing was held pursuant to the Commissioner's notice. Three witnesses were heard. The first

was Kern E. Church, Deputy Commissioner of Insurance in charge of the Engineering & Building Codes Division, who testified regarding the North Carolina State Building Code Council's regulations of mobile home tie-downs to prevent wind loss. Mr. Church explained how tie-downs might operate in various areas of the State to reduce damage to mobile homes caused by windstorms. On cross-examination, Mr. Church stated that he would not be qualified " . . . to speak on any relation between tie-down and personal liability risks or theft of personal property risks, or basic fire risks, primarily aimed at wind as say (sic) would be related from insurance standpoint."

The second witness at the hearing was Charles B. Aycock, Manager of the North Carolina Fire Insurance Rating Bureau. He testified, inter alia, that the North Carolina Fire Insurance Rating Bureau has the authority to exercise responsibilities over the mobile home program; that in response to the Commissioner's Notice of Hearing, the executive committee of the Rating Bureau authorized a credit on the premiums payable on mobile homes in the amount of ten percent (10%); that this credit would extend across the board to the entire premium and would apply to risks other than those which were wind-related; that the executive committee assumed that the statute directed a credit to only the wind-related risks, but such a credit was not possible because the Rating Bureau did not have sufficient data to segregate the portion of the total premium which was related to wind losses; and that the Rating Bureau would have attempted to relate the discount to the wind-related losses, if the necessary statistical data had been available.

The final witness was Gerald W. Bell, Assistant Vice President of Foremost Insurance Company (hereinafter called "Foremost"), petitioner herein, and Manager of its State Filings Department. After being qualified as an expert, Bell gave extensive testimony regarding petitioner's statistical data and loss experience in North Carolina for the years 1971 through 1974. He stated, inter alia, that Foremost had totalled the amount of losses to mobile homes under its comprehensive insurance coverage and divided the sum into component parts according to the cause of the loss, i.e., fire, theft, flood, wind, etc.; that 13.5% of the total losses were wind-related; that tie-downs would not eliminate the entire amount of wind-related losses; that tie-downs would reduce wind-related losses by only 27.7%; that the estimated savings resulting from tie-downs

would justify a premium credit of four dollars for a comprehensive policy on the mobile home, with an additional credit of one dollar for the personal effects portion of the coverage.

On 31 October 1975, the Commissioner issued an order which stated:

"FINDINGS OF FACT

1. That subsequent to notice of hearing the North Carolina Fire Insurance Rating Bureau made three filings for a revision in the rules for tie-down credit of 10% in each of the filings.

2. That the North Carolina Fire Insurance Rating Bureau waived notice of hearing on their filings and agreed to proceed under a combined hearing.

3. That Foremost Insurance Company appeared and offered evidence at the hearing in response to the original notice of the Commissioner.

4. That Foremost Insurance Company did not object to the merger of the hearings of the issue set forth in the notice of hearing and the hearing on the filings made by the North Carolina Fire Insurance Rating Bureau.

5. That seventeen out of forty-seven insurance companies writing mobile home policies are allowing a mobile home tie-down credit at this time.

6. That no credible statistics were introduced for all companies writing mobile home coverages that would demonstrate that the credits allowed in the North Carolina Fire Insurance Rating Bureau filings were unwarranted, unreasonable, improper or unfairly discriminatory.

7. That the Commissiner of Insurance has promulgated a regulation for mobile homes which includes the standard for mobile home tie-downs (USAS A119.1, 1969 edition).

8. That the premium or rate charged for the peril of wind damage is indivisible, in that the peril is included with other perils in these policies and the permium or rate for windstorm cannot be separately obtained.

CONCLUSIONS OF LAW

1. The revisions of the rules for tie-down credit of 10% in each of the filings made by the North Carolina Fire Insurance Rating Bureau are warranted, reasonable, proper and are not unfairly discriminatory.

2. The 1975 Session of the General Assembly of North Carolina authorized and directed the Commissioner of Insurance to implement not less than a ten percent (10%) discount from the insurance premium otherwise applicable to be allowed in diminution of the premium charged insureds under Mobile Home Owner Policies and Mobile-Homeowner's Policies where the mobile home covered by the policy has been properly secured in accordance with regulations of the North Carolina State Building Code Council as approved by the Commissioner and which affords no less protection from windstorm damage than the aforesaid regulations.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. That the revision in the rules for tie-down credit of ten percent (10%) requested in the above filings are approved effective November 1, 1975."

On 1 December 1975, Foremost filed a Petition for Review pursuant to G.S. 58-9.3 in the Superior Court of Wake County, requesting judicial review of the order of the Commissioner. This petition was heard before Hall, Judge, who on 11 February 1976 entered a judgment which stated:

"That although the Respondent's findings of fact, do not support the Respondent's conclusions of law, the Order of Respondent, dated October 31, 1975, and approving the revision in the rules for tie-down credit of ten percent (10%) as requested in the filings of the N. C. Fire Insurance Rating Bureau, is hereby affirmed in accordance with the provisions of NCGS Sec 58-131.3A which directs the Respondent, Commissioner of Insurance, to implement the ten percent (10%) tie-down credit referred to in the Order of October 31, 1975."

From this judgment, petitioner appealed.

Attorney General Edmisten, by Associate Attorney James M. Wallace, Jr., for the Commissioner of Insurance, respondent appellee.

Bode & Bode, P.A., by Robert V. Bode, for petitioner appellant.

MORRIS, Judge.

Petitioner contends that the trial court erred in affirming the Commissioner's order after determining that the order's findings of fact do not support its conclusions of law. We are constrained to agree.

G.S. 58-131.3A, which is the basis for this action, is codified in Chapter 58 of the General Statutes under Article 13, entitled "Fire Insurance Rating Bureau." The provisions of Article 13, which encompasses G.S. 58-125 through G.S. 58-131.9, are appropriate in determining the standards applicable to the order of the Commissioner. G.S. 58-126 states that:

> "The provisions of this Article shall apply to insurance against loss to property located in this State, or to any valuable interest therein, by fire, lightning, *windstorm*, explosion, theft of or physical damage to motor vehicles, *and all other kinds of insurance which fire insurance companies are authorized to write in this State. . . .* " (Emphasis supplied.)

G.S. 58-131.5 sets out the necessity for notice and a hearing before the Commissioner makes any rule, regulation or order under Article 13. G.S. 58-131.8 provides that any review of any order made by the Commissioner in accordance with the provisions of Article 13 shall be to the Superior Court of Wake County pursuant to G.S. 58-9.3, which states in pertinent part:

> "(a) Any order or decision made, issued or executed by the Commissioner . . . shall be subject to review in the Superior Court of Wake County on petition by any person aggrieved . . .
>
> (b) The Commissioner shall within 30 days . . . prepare and file with the Clerk of the Superior Court of Wake County a complete transcript of the record of the hearing, if any, had before him, and a true copy of the order or decision duly certified. The order or decision of the Com-

missioner *if supported by substantial evidence* shall be presumed to be correct and proper." (Emphasis supplied.)

In *In re Filing by Automobile Rate Office*, 278 N.C. 302, 180 S.E. 2d 155 (1971), Lake, J., in a dissenting opinion, summarized the procedure set forth in G.S. 58-9.3.

> "The reviewing court is charged by G.S. 58-9.3(b) with the duty of reviewing findings of fact made by the Commissioner. . . . The statute states that the order of the Commissioner 'if supported by substantial evidence' shall be presumed to be correct. Obviously, the statute contemplates that *the reviewing Court is to determine whether there is substantial evidence in the record to support the Commissioner's findings of fact which are essential to his ultimate finding* that the rates are excessive or inadequate, reasonable or unreasonable." (Emphasis supplied.) 278 N.C., at 323-24, 180 S.E. 2d at 169.

Thus, it is incumbent upon the Commissioner to support any order pursuant to Article 13 by substantial evidence found in the record of the hearing. If the order does not meet the substantial evidence test, it will not withstand judicial review. *State ex rel. Commissioner of Insurance v. Automobile Rate Administrative Office*, 287 N.C. 192, 214 S.E. 2d 98 (1975); *State ex rel. Commissioner of Insurance v. Automobile Rate Administrative Office*, 24 N.C. App. 223, 210 S.E. 2d 441 (1974), cert. denied, 286 N.C. 412, 211 S.E. 2d 801 (1975).

[1] We have examined the essential findings of fact in the Commissioner's order of 31 October 1975 and conclude that they are not supported by substantial evidence and do not support the conclusions of law. Findings 1, 2, 3, 4 and 7 list general facts and do not purport to substantiate the conclusions of law. Finding of fact 5, which states that a minority of insurance companies in North Carolina presently allow mobile home tie-down credits, provides no basis for setting such a credit. Finding of fact 6, in effect, shifts the burden of proof from the Rating Bureau to petitioner. This clearly is not the law. The Rating Bureau is the movant in a proceeding such as this and the burden is upon it to establish that the proposed rate is fair and reasonable. *In re Filing by Fire Ins. Rating Bureau*, 275 N.C. 15, 165 S.E. 2d 207 (1969). Finding of fact 8, which declares that the portion of the premium charged for windstorm damage is indivisible and cannot be separately obtained, is con-

trary to the evidence presented at the hearing. The testimony given on this point by petitioner was to the effect that windstorm losses could be and in fact were segregated from other losses by petitioner. Therefore, we agree with the judgment of the Superior Court that the respondent's findings of fact do not support its conclusions of law.

[2] Yet respondent contends that no findings of fact were necessary because G.S. 58-131.3A "authorized and *directed*" the Commissioner to implement a discount and that this "direction" constitutes a legislative determination which petitioner may not challenge. We disagree. While the language of the statute directs the implementation of *some* discount of not less than ten percent, the precise amount of the discount was not set forth. We believe the General Assembly intended that the size of the discount be determined only after compliance with the procedures and standards contained in Article 13 of Chapter 58. G.S. 58-126. Therefore, the substantial evidence requirement of G.S. 58-9.3 must be met, regardless of the amount of the discount determined by the Commissioner. Since this requirement was not complied with, the order of the Commissioner cannot stand.

[3] A final question is presented with regard to construction of G.S. 58-131.3A, which authorizes a discount of not less than ten percent from the insurance premium *"otherwise applicable"* when the mobile home is tied down in accordance with the North Carolina State Building Code standards or any other standard "approved by the Commissioner *and which affords no less protection from windstorm damage.*" Petitioner contends that this language permits a reduction in only that part of the premium associated with windstorm losses. Respondent, on the other hand, argues that the statute authorizes a discount of not less than ten percent of the entire premium rather than just the windstorm-related portion. We agree with the petitioner's construction of the statute and hold that G.S. 58-131.3A is concerned solely with discounts as to wind-related losses.

It is a tenet of the insurance industry that mobile home premiums are set by examining past losses and thereby projecting future expenditures. These losses are caused by many factors, including fire, theft, flood, and wind. Obviously, tie-downs cannot eliminate losses from all such causes, and, according to testimony given at the hearing, they do not prevent the

majority of damage caused by wind. G.S. 58-131.3A specifically addresses itself to "windstorm damage" and discounts from premiums "otherwise applicable." No discount is authorized for other precautions, such as fireproofing or waterproofing, and no other cause of damage is mentioned in the statute. The clear purpose of the statute is to prevent windstorm damage by giving an incentive to those owners who anchor their mobile homes. Accordingly, we believe the legislature intended a discount only as to the portion of the premium relating to the windstorm losses. This interpretation of the statute is reinforced by the fact that the Commissioner is authorized to order a discount of *any* amount so long as it is "not less than ten percent." Certainly the legislature did not intend to give the Commissioner the power to discount what could be a substantial percentage of the *entire* premium based on what would otherwise be a relatively small windstorm savings to the industry. We also take note of the fact that Mr. Aycock testified that the Rating Bureau's executive committee assumed that the statute directed a credit to the premium charged for wind-related risks and that the Bureau recommended a discount of the entire premium only because it was without sufficient data to divide the premium into its component parts. Foremost's evidence at the hearing spoke directly to the problem of segregating the windstorm losses, and no contradictory evidence was introduced. Therefore, we believe, and so hold, that the Commissioner should have incorporated this into his order and that the discount should relate only to the portion of the premium related to windstorm damage.

The judgment of the court is reversed and the order of the Commissioner is vacated.

Judge CLARK concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting:

In my view the legislature, by the statute in question, has directed the Commissioner to allow a ten percent discount from "the insurance premium otherwise applicable" if the policy is written on a mobile home that is secured in the required manner. His order allowing the ten percent discount was purely

ministerial because the legislature has set that as the minimum discount. A hearing is required only if he allows a discount of more than ten percent. The legislature has said that the ten percent discount will be from the "insurance premium otherwise applicable," not from some combination of loss factors that may be a part of the basis for the "insurance premium" or cost of the "policy" to the insured. The statute, if it is to be rewritten, should be rewritten by the body that enacted it. The legislature could have had many reasons for enacting the statute other than a simple recognition of the potential for diminished damages by windstorms to a particular insured.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 SEPTEMBER 1976

FREIWIRTH v. FREIWIRTH No. 7616DC353	Robeson (74CVD1217)	Affirmed
HOLDEN v. HOLDEN No. 7610DC20	Wake (75CVD1301)	Remanded
IN RE LEWIS No. 762DC265	Hyde (74CVD71)	Affirmed
STATE v. ALBERT No. 769SC302	Vance (71CR1347)	Affirmed
STATE v. COUGHENOUR No. 7619SC296	Rowan (75CR12751)	No Error
STATE v. FRENCH No. 768SC321	Lenoir (75CR9594)	No Error
STATE v. HINES No. 7610SC277	Wake (75CR58705-A) (75CR58705-B) (75CR58705-C) (75CR59096)	No Error
STATE v. LOCKLEAR No. 7616SC299	Robeson (75CR12480)	No Error
STATE v. MARSHALL No. 7626SC340	Mecklenburg (75CR6641)	No Error
STATE v. MITCHELL No. 7618SC298	Guilford (75CR9752)	No Error
STATE v. NORRIS No. 7613SC342	Columbus (75CR7190)	No Error
STATE v. SHORT No. 7629SC244	Rutherford (75CR5612)	No Error
STATE v. STONE No. 769SC327	Person (75CR2896)	No Error
STATE v. WASHINGTON & PARTLOW No. 7621SC294	Forsyth (75CR36544) (75CR36545) (75CR36546) (75CR36547)	No Error
STATE v. WINFREY No. 7612SC319	Cumberland (74CR42725)	No Error

AMENDMENT TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

The first paragraph of Rule 14(d)(1) of the Rules of Appellate Procedure, 287 N.C. 671, 712, shall be amended to read as follows (new material, except for caption, appears in italics):

> **Filing and Service; Copies.** Within 20 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought; *provided, however, that when the appeal is based solely upon the existence of a substantial constitutional question the appellant shall file and serve a new brief within 20 days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist.* Within 15 days after the service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief.

This amendment to Rule 14(d)(1) was adopted by the Supreme Court in conference on January 31, 1977, to become effective immediately upon its adoption. It shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

EXUM, J.

For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this index, e.g., Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

TOPICS COVERED IN THIS INDEX

ACCORD AND SATISFACTION
ADMINISTRATIVE LAW
ANIMALS
APPEAL AND ERROR
ARREST AND BAIL
ASSAULT AND BATTERY
ATTORNEY AND CLIENT
ATTORNEY GENERAL
AUTOMOBILES

BROKERS AND FACTORS
BURGLARY AND UNLAWFUL BREAKINGS

COMPROMISE AND SETTLEMENT
CONSPIRACY
CONSTITUTIONAL LAW
CONTEMPT OF COURT
CONTRACTS
CORPORATIONS
COURTS
CRIMINAL LAW

DAMAGES
DEATH
DIVORCE AND ALIMONY
DURESS

EMINENT DOMAIN
EQUITY
ESCAPE
EVIDENCE
EXECUTORS AND ADMINISTRATORS

FALSE PRETENSE
FOOD
FORGERY
FRAUD

GIFTS

HIGHWAYS AND CARTWAYS
HOMICIDE
HUSBAND AND WIFE

INDICTMENT AND WARRANT
INFANTS
INJUNCTIONS
INSANE PERSONS
INSURANCE
INTEREST
INTOXICATING LIQUOR

JUDGMENTS
JURY

KIDNAPPING

LANDLORD AND TENANT
LARCENY
LIMITATION OF ACTIONS

MALICIOUS PROSECUTION
MASTER AND SERVANT
MUNICIPAL CORPORATIONS

NARCOTICS
NEGLIGENCE

PARENT AND CHILD
PERJURY
PLEADINGS
PRINCIPAL AND AGENT
PRIVACY
PROCESS
PROPERTY

QUASI CONTRACTS

RECEIVING STOLEN GOODS
REGISTRATION
RULES OF CIVIL PROCEDURE

SCHOOLS
SEARCHES AND SEIZURES

TAXATION
TELEPHONE AND TELEGRAPH COMPANIES
TORTS
TRIAL
TRUSTS

UNFAIR COMPETITION
UNIFORM COMMERCIAL CODE
USURY
UTILITIES COMMISSION

VENDOR AND PURCHASER

WILLS
WITNESSES

ACCORD AND SATISFACTION

§ 1. Nature and Essentials of Agreement

Summary judgment was properly entered for plaintiff on issue of accord and satisfaction in an action upon notes given for the amount remaining due for construction of a motel. *Construction Co. v. Coan,* 731.

ADMINISTRATIVE LAW

§ 5. Review as to Administrative Orders

Superior court had no jurisdiction to review the dismissal of a highway patrolman. *Darnell v. Dept. of Transportation,* 328.

ANIMALS

§ 7. Criminal Responsibility for Cruelty to Animals

Statute allowing possession of a black bear without caging only under conditions simulating a natural habitat is constitutional. *Cannady v. Wildlife Resources Comm.,* 247.

APPEAL AND ERROR

§ 14. Appeal and Appeal Entries

Both filing and service of notice of appeal are required within 10 days after entry of judgment, and trial court lacks authority to permit the notice of appeal to be served after the expiration of the 10 days. *Giannitrapani v. Duke University,* 667.

§ 52. Invited Error

Trial court's award of damages in action for breach of contract giving plaintiff the exclusive right to sell property constituted invited error. *Development Corp. v. Alderman-250 Corp.,* 598.

ARREST AND BAIL

§ 3. Right of Officers to Arrest Without Warrant

Defendant's warrantless arrest was lawful where the arresting officer had reasonable grounds to believe that defendant had committed a felony. *S. v. Campbell,* 652.

ASSAULT AND BATTERY

§ 14. Sufficiency of Evidence

State's evidence was sufficient for the jury in a prosecution for malicious injury of an SBI agent by means of an explosive device. *S. v. Grier,* 281.

ATTORNEY AND CLIENT

§ 7. Fees

Neither a sales receipt nor an invoice containing a provision for attorney's fees is an "evidence of indebtedness" within the meaning of G.S. 7-21.2 and such provision is ineffectual. *Supply, Inc. v. Allen,* 272.

ATTORNEY AND CLIENT — Continued

Statutory requirement that the court must find that the party ordered to furnish support has refused to provide adequate support in order for attorney's fees to be awarded applies only in support actions and not in custody or custody and support actions. *Arnold v. Arnold*, 683.

ATTORNEY GENERAL

Superior court had inherent authority to enter a protective order prohibiting public disclosure of information submitted by a telephone company to the Attorney General in an investigation concerning possible misuse of corporate funds by the telephone company. *In re Investigation by Atty. General*, 585.

AUTOMOBILES

§ 2. Grounds and Procedures for Revocation or Suspension of Driver's License

The habitual offender statute is constitutional. *S. v. Freedle*, 118.

§ 3. Driving While License Suspended

In a prosecution for driving while license is suspended, the burden is upon the State to prove that defendant had knowledge at the time charged that his license was suspended, and court's instructions on knowledge by defendant were improper in this case. *S. v. Chester*, 224.

§ 72. Sudden Emergency

Trial court did not err in failing to instruct the jury on the doctrine of sudden emergency since plaintiff's negligence contributed to the creation of any emergency that existed. *Foy v. Bremson*, 662.

§ 83. Pedestrian's Contributory Negligence

Plaintiff was not contributorily negligent as a matter of law in failing to see defendant's car as it backed toward her in a parking lot. *Evans v. Stiles*, 317; in failing to see the vehicle which struck him. *Thornton v. Cartwright*, 674.

§ 88. Sufficiency of Evidence of Contributory Negligence for Jury

Evidence that plaintiff ran into defendant's vehicle which was parked on the highway without any lights on was sufficient to show contributory negligence of plaintiff. *Williamson v. Basinger*, 50.

§ 89. Sufficiency of Evidence of Last Clear Chance for Jury

Plaintiffs were not prejudiced by the submission of a last clear chance issue to the jury since defendants were not awarded damages. *Williamson v. Basinger*, 50.

§ 90. Instructions in Automobile Accident Cases

In an action for damages sustained when plaintiff was struck by an automobile operated by one defendant at night while plaintiff was helping the other defendant get a truck out of a ditch, trial court's instructions on negligence were proper. *Foy v. Bremson*, 662.

AUTOMOBILES — Continued

Trial court erred in failing to instruct the jury on the right of a bicyclist to assume that other drivers will observe the rules of the road and stop in obedience to a traffic signal. *Townsend v. Frye*, 634.

Trial court erred in failing to instruct that a minor between the ages of 7 and 14 is presumed incapable of contributory negligence. *Ibid.*

§ 108. Family Purpose Doctrine

A motorbike operated by an unlicensed minor exclusively on private property was not a "family purpose" vehicle. *Williams v. Trust Co.*, 18.

§ 120. Elements of Offense Proscribed by G.S. 20-138

Statute prohibiting driving upon the public highways when the alcohol content in one's blood is .10 percent or more by weight is constitutional, and provision that such offense shall be treated as a lesser included offense of driving under the influence is valid. *S. v. Basinger*, 45.

§ 126. Competency and Relevancy of Evidence in Prosecution Under G.S. 20-138

Delay of 50 minutes between defendant's arrest and the administration of a breathalyzer test to him did not render the results of the test inadmissible. *S. v. Basinger*, 45.

§ 127. Sufficiency of Evidence in Prosecution Under G.S. 20-138

Evidence was sufficient for the jury in a prosecution for driving under the influence. *S. v. Basinger*, 45.

§ 129. Instructions in Prosecution Under G.S. 20-138

Trial court in a prosecution for driving under the influence erred in failing to instruct on the lesser included offense of reckless driving. *S. v. Burrus*, 250.

BROKERS AND FACTORS

§ 6. Right to Commissions

Contract granting real estate agent the exclusive right to sell property did not give the owner the right to co-broker the property. *Beasley-Kelso Associates v. Tenney*, 708.

BURGLARY AND UNLAWFUL BREAKINGS

§ 2. Breaking and Entering Otherwise than Burglariously

Defendant did not have authorized consent to enter a residence where entrance was the result of a conspiracy with a friend to enter the residence occupied by the friend and his parents and to steal therefrom property owned by the parents. *S. v. Tolley*, 213.

§ 5. Sufficiency of Evidence

Evidence was sufficient for the jury in a prosecution for breaking and entering and larceny where it tended to show that defendants were in possession of items recently stolen from a house which had been broken into. *S. v. Greene*, 507.

BURGLARY AND UNLAWFUL BREAKINGS — Continued

§ 6. Instructions

Trial court erred in applying the doctrine of possession of recently stolen property to both defendants. *S. v. Majette*, 120.

§ 7. Instructions as to Possible Verdict

In a prosecution for breaking and entering and larceny, trial court erred in instructing the jury that since the State relied entirely on the doctrine of possession of recently stolen property, the jury should return the same verdict in both cases. *S. v. Barnes*, 671.

COMPROMISE AND SETTLEMENT

§ 3. Practice and Procedure

Plaintiff's plea of a release obtained by his insurance carrier as a bar to defendant's counterclaim in a former action between the parties, although now withdrawn by plaintiff, constituted a ratification of the release and barred plaintiff's present action against defendant. *Fowler v. McLean*, 393.

CONSPIRACY

§ 3. Elements of Criminal Conspiracy

An implied understanding is sufficient to constitute a conspiracy. *S. v. Grier*, 281.

§ 5. Relevancy and Competency of Evidence

A defendant who is a party to a conspiracy is equally guilty as a principal with the other participants in the commission of the crimes contemplated by the conspiracy even though defendant was not personally present at the crime scene. *S. v. Grier*, 281.

§ 6. Sufficiency of Evidence

State's evidence was sufficient for the jury in a prosecution for conspiracy maliciously to injure an SBI agent by use of an explosive device. *S. v. Grier*, 281.

§ 7. Instructions

In a prosecution for conspiracy to assault, trial court's instructions as to what duress would excuse one's behavior was proper. *S. v. Puryear*, 719.

§ 8. Verdict and Judgment

Sentence of imprisonment for two years imposed upon defendant convicted of conspiracy to commit assault was proper. *S. v. Puryear*, 719.

CONSTITUTIONAL LAW

§ 20. Equal Protection

Statute providing for classification of modes of transportation of alcoholic beverages does not offend the equal protection clause of the Federal or State Constitutions. *S. v. Terry*, 372.

CONSTITUTIONAL LAW — Continued

§ 26. Full Faith and Credit to Foreign Judgment

N. C. court erred in giving full faith and credit to Hawaii paternity and child support judgment since the Hawaii court never obtained personal jurisdiction over defendant. *Brondum v. Cox*, 35.

§ 29. Right to Trial by Duly Constituted Jury

Trial court erred in failing to order a mistrial where an alternate juror was in the jury room after the jury had begun deliberations, although defendant declined to make a motion for a mistrial. *S. v. Rowe*, 115.

§ 30. Due Process in Trial

The fact that arraignment takes place and that the indictment is read before the jury does not violate defendant's right to due process. *S. v. Carter*, 59.

Defendant failed to carry his burden of proof in showing that his right to a speedy trial was denied. *S. v. Eppley*, 217.

§ 31. Access to Evidence

The prosecution did not wrongfully suppress evidence in violation of defendant's right to due process where the evidence was not requested by the defense and was only remotely favorable to the defense. *S. v. Pevia*, 79.

CONTEMPT OF COURT

§ 6. Findings and Judgment

Trial court properly denied plaintiff's motion that defendant be found guilty of contempt of court for disobeying a consent judgment requiring that defendant cease using plaintiff's product numbering system in their catalog. *Equipment Co., Inc. v. Weant*, 191.

CONTRACTS

§ 12. Construction and Operation of Contract

A genuine issue of material fact was raised as to whether a written contract constituted a loan or an agreement to convey stock when issued. *Whitten v. AMC/Jeep, Inc.*, 161.

Where a contract provided that defendant and plaintiff would equally divide proceeds of a sale of land exceeding defendant's cost basis, defendant was not entitled to add to its cost basis interest and taxes expended to carry the property from the time the contract was entered until the property was sold. *Development Corp. v. Alderman-250 Corp.*, 598.

§ 16. Condition Precedent; Time of Performance

Conveyance of land to defendant in accordance with terms of a consent judgment was not a condition precedent to defendant's personal liability under the judgment for interest and penalties because of defendant's failure as executor to file tax returns. *Price v. Horn*, 10.

CONTRACTS — Continued

§ 17. Term and Duration of Agreement

Evidence supported the trial court's finding that a contract for the marketing of commercial properties had not been in effect for a reasonable period of time when defendant attempted to terminate the contract four years and three months after it was entered. *Development Corp. v. Alderman-250 Corp.*, 598.

§ 19. Novation

There was a genuine issue of material fact as to whether an option to purchase equipment at the end of the lease period was valid and whether a novation had extinguished such option. *Transportation Systems v. Service, Inc.*, 289.

§ 25. Pleadings and Issues

Where the complaint pleads both an express contract and an implied contract and there is evidence to support both theories, issues should be submitted to the jury as to both. *Critcher v. Ogburn*, 182.

§ 27. Sufficiency of Evidence

Evidence was sufficient for the jury to determine that there was an oral contract between the parties for landscaping services. *Alligood v. Henning*, 126.

In an action to recover upon an express contract for services rendered decedent, evidence was sufficient for the jury. *Critcher v. Ogburn*, 182.

Trial court properly entered summary judgment for plaintiff for cash price stated in contract but erred in entering summary judgment for finance charge and counsel fees. *Construction Co. v. Gibson*, 385.

In an action to recover for repairs made by plaintiff to defendant's truck, there was no triable issue of fact as to whether there was a contract between plaintiff and third party defendant whereby the latter agreed to pay for the repairs. *Trucks, Inc. v. Bridges*, 355.

Defendant did not breach its contract to procure a survey of land on which a house was being built and for which defendant was providing a construction loan. *Mosley v. Savings and Loan Assoc.*, 522.

Evidence was sufficient to show that plaintiff accepted defendant's offer to lease heavy equipment. *Leasing Associates v. Rowland*, 590.

§ 29. Measure of Damages for Breach of Contract

Trial court's finding that defendant's conditional tender to plaintiff of only a portion of the sum due under a contract constituted a conversion of the sum due was insufficient to support an award of punitive damages. *Development Corp. v. Alderman-250 Corp.*, 598.

In an action for breach of a contract to market and sell certain property, trial court's award of damages to plaintiff based upon determination of the fair market value of the property on the date defendant repudiated its agreement with plaintiff, rather than upon the amount for which the property could have been sold in the exercise of reasonable care and judgment, constituted invited error. *Ibid.*

CONTRACTS — Continued

§ 32. Action for Wrongful Interference

Summary judgment was properly entered for defendant in an action for wrongful interference with performance of a contract for legal services. *Gudger v. Furniture, Inc.*, 387.

CORPORATIONS

§ 8. Authority and Duties of President and Power to Bind Corporation

A corporate president who exceeded his authority in executing a contract with plaintiff is personally responsible to plaintiff unless he is absolved of such liability by a contract provision. *Whitten v. AMC/Jeep, Inc.*, 161.

§ 25. Contracts and Notes

Corporation was not liable for contract executed by its president which was in excess of the president's authority. *Whitten v. AMC/Jeep, Inc.*, 161.

COURTS

§ 11.1. Practice and Procedure in District Court

Notice of appeal from a magistrate to district court need not be served by a judicial officer or be accepted by the appellee, but is sufficient if served upon appellee's attorney by mail. *Supply Co. v. McClain*, 132.

§ 21. What Law Governs; as Between Laws of this State and Other States

Trial court properly applied the rule followed by the N. Y. appellate courts upholding and enforcing the standby fee contained in a loan commitment as liquidated damages or as consideration for the commitment. *Construction Co. v. Bank*, 155.

Validity of contracts containing covenants not to compete are governed by the law of the place where the contracts were made. *Laboratories, Inc. v. Turner*, 686.

CRIMINAL LAW

§ 11. Accessories After the Fact

Defendant could be convicted of accessory after the fact to voluntary manslaughter even though the principal felon was convicted only of involuntary manslaughter, and the fact that defendant was unsuccessful in his efforts to aid the principal felon is immaterial. *S. v. Martin*, 166.

§ 15. Venue

Trial court properly denied defendants' motion for change of venue on the ground of publicity and the large number of unsolved similar crimes in the county. *S. v. Bryson*, 71.

Trial court properly denied defendant's motion for change of venue on ground of pretrial publicity. *S. v. Jackson*, 187.

CRIMINAL LAW — Continued

Trial court did not err in denying defendant's motion to dismiss for improper venue where that issue had previously been decided. *S. v. Puryear*, 719.

§ 22. Arraignment and Pleas

The fact that arraignment takes place and that the indictment is read before the jury does not violate defendant's right to due process. *S. v. Carter*, 59.

§ 34. Evidence of Guilt of Other Offenses

Trial court in a murder prosecution properly allowed evidence of defendant's commission of a separate robbery. *S. v. Hamrick*, 143.

§ 35. Evidence Offense Was Committed by Another

Trial court in a larceny case did not err in excluding evidence that the offense was committed by another. *S. v. Vanderhall*, 239.

§ 40. Evidence and Record at Former Trial

Trial court in a third trial of defendant for armed robbery properly admitted transcript of the deceased victim's testimony at a previous trial. *S. v. Jackson*, 187.

Defendant in a perjury prosecution was not prejudiced by the admission of the transcript of defendant's entire testimony at the murder trial at which he allegedly committed perjury. *S. v. Wilson*, 149.

§ 50. Expert and Opinion Testimony

A nonexpert witness may testify as to the value of his personal property. *S. v. Tolley*, 213.

§ 51. Qualification of Experts

Trial court properly found that an officer was an expert in identification of marijuana. *S. v. Clark*, 253.

§ 66. Evidence of Identity by Sight

Supreme Court determination that the victim's identification of defendant was admissible became the law of the case at defendant's retrial. *S. v. Jackson*, 187.

§ 73. Hearsay Testimony

Testimony that either defendant or his companion told a witness they had left "the stuff" in the woods was incompetent as hearsay. *S. v. Cox*, 54.

Ordinarily, testimony of a voluntary confession of a third party that he committed the crime of which defendant was accused is incompetent as hearsay. *S. v. Vanderhall*, 239.

Trial court in a prosecution for conspiracy to assault did not err in allowing the victim to testify as to statements made by defendant and his co-conspirators. *S. v. Puryear*, 719.

§ 75. Tests of Voluntariness of Confession; Admissibility

Officer's statement to defendant that "it would be better for him to tell the truth" did not render defendant's statements inadmissible in evidence. *S. v. Raines*, 176.

CRIMINAL LAW — Continued

Defendant's incriminating statements were not inadmissible because he initially indicated he wanted an attorney where defendant thereafter signed a written waiver of his constitutional rights. *S. v. Raines*, 176.

Incriminating statements made by the intoxicated defendant to a witness were properly admitted in a murder prosecution. *S. v. Hamrick*, 143.

Defendant's confession made after his warrantless arrest was properly admitted into evidence. *S. v. Campbell*, 652.

§ 76. Determination of Admissibility of Confession

Evidence supported the court's determination that defendant was not intoxicated when he confessed. *S. v. Mangum*, 311.

§ 80. Records and Private Writings

Testimony as to contents of records in the Virginia Department of Education was hearsay and not admissible under the public records exception to the hearsay rule. *S. v. Rogers*, 298.

Trial court did not err in allowing a witness to read written statements previously made by him. *S. v. Greene*, 507.

§ 84. Evidence Obtained by Unlawful Means

Trial court did not err in asking leading questions of a police officer for the purpose of clarifying his testimony during a hearing on a motion to suppress evidence. *S. v. Watlington*, 101.

Items seized incident to defendant's arrest were admissible where the arrest was made with probable cause even though the arrest was in violation of N. C. statute because made by a city officer more than one mile outside the city boundary. *S. v. Mangum*, 311.

§ 86. Credibility of Defendant

Defendant was not prejudiced by the court's refusal to allow defendant to explain fully prior convictions which he admitted on cross-examination. *S. v. Chandler*, 646.

§ 87. Direct Examination of Witnesses

Defendant was not prejudiced by testimony of a witness not on the list furnished defendant by the State. *S. v. Hamrick*, 143.

§ 89. Credibility of Witnesses; Corroboration

Trial court did not err in failing to instruct on the purpose of corroborative evidence at the time of its admission. *S. v. Dupree*, 232.

§ 90. Rule that Party is Bound by Own Witness

In a prosecution of defendant for perjury in a murder trial, testimony by a State's witness that he had himself testified falsely at the murder trial did not violate the rule against impeachment of one's own witness. *S. v. Wilson*, 149.

State's offer of defendant's confession which conflicted with testimony of the State's witnesses did not constitute impeachment by the State of its own witnesses. *S. v. Johnson*, 376.

CRIMINAL LAW — Continued

§ 92. Consolidation of Counts

Cases against three defendants charged with the same offense were properly joined for trial although the solicitor's motion was not in writing. *S. v. Cottingham,* 67; *S. v. Bryson,* 71; *S. v. Pevia,* 79; *S. v. Greene,* 507.

State's written motion for joinder of defendants' trials complied with statutory requirements. *S. v. Majette,* 120.

§ 96. Withdrawal of Evidence

Trial court did not err in striking an exchange between defense counsel and a witness on cross-examination which required the witness to comment on the veracity of a named person. *S. v. Campbell,* 652.

§ 101. Misconduct Affecting Jury

Defendant was not prejudiced by remarks between counsel and the trial court made in the jury's presence concerning the case immediately preceding defendant's. *S. v. Vanderhall,* 239.

§ 102. Argument of District Attorney

Trial court did not err in the denial of motion for mistrial because of the district attorney's jury argument that "the defendant was in possession of property which he, the defendant, must have or in some way stolen." *S. v. Chandler,* 646.

§ 111. Form and Sufficiency of Instructions

Trial court did not err in giving the jury written instructions with respect to the elements of the crime charged. *S. v. Majette,* 120.

Defendant was not prejudiced when the court gave the jury sealed envelopes containing memoranda on the essential elements of the crimes. *S. v. Mangum,* 311.

§ 112. Instructions on Burden of Proof and Presumptions

Defendants were not prejudiced by charge defining reasonable doubt as a "possibility of innocence." *S. v. Majette,* 120.

Charge of the court made it clear the jury could consider lack of evidence on the question of reasonable doubt. *S. v. Dupree,* 232.

§ 113. Statement of Evidence and Application of Law Thereto

Trial court's instructions could not have misled the jury into believing that if they found one or more of the defendants guilty they were to find all three guilty. *S. v. Cottingham,* 67.

Trial court did not err in recapitulating evidence that persons who were not on trial were involved in the crimes for which defendant was being tried. *S. v. Tolley,* 213.

§ 114. Expression of Opinion by Court on Evidence in the Charge

Trial court's instruction that a State's witness "is what the court will classify as an accomplice" did not constitute an expression of opinion. *S. v. Dupree,* 232.

In a prosecution for conspiracy to assault, trial court's instruction on taking the law into one's own hands was proper. *S. v. Puryear,* 719.

CRIMINAL LAW — Continued

§ 117. Charge on Character Evidence and Credibility of Witness

Trial court erred in instructing that self-incriminating testimony by an uncle of defendant should be carefully scrutinized as testimony of an interested witness. *S. v. Lamb*, 255.

§ 119. Request for Instructions

Request for special instruction must be in writing and made before court's charge to the jury. *S. v. Jackson*, 187.

§ 120. Instruction on Right of Jury to Recommend Mercy

Trial court's instruction given in response to jury inquiry as to whether it could recommend mercy or psychiatric treatment was not prejudicial. *S. v. Jordan*, 529.

§ 122. Instructions After Initial Retirement of Jury

Trial court properly denied jury foreman's request that the court reporter read back all of the evidence. *S. v. Culp*, 398.

§ 124. Sufficiency and Effect of Verdict

In a prosecution for breaking and entering and larceny, trial court erred in instructing the jury that since the State relied entirely on the doctrine of possession of recently stolen property, the jury should return the same verdict in both cases. *S. v. Barnes*, 671.

§ 127. Arrest of Judgment

Defendant was not entitled to have judgment arrested on the ground the jury could not find him guilty of resisting an officer when it found him not guilty of resisting a second officer. *S. v. Chandler*, 646.

§ 142. Suspended Sentences

Sentence of two years on the roads suspended on condition that defendant remove his trailer from its location was a sentence of banishment and was void. *S. v. Culp*, 398.

§ 143. Revocation of Suspension of Sentence

Hearing in superior court on appeal from a district court order placing into effect a suspended sentence was de novo as required by statute. *S. v. Cash*, 677.

Evidence was sufficient to support court's finding that defendant was able to comply with a condition of his suspended sentence requiring him to make weekly child support payments and that his failure to do so was without lawful excuse. *Ibid.*

§ 149. Right of State to Appeal

The State had no right of appeal where the district court entered a special verdict of not guilty on behalf of defendant. *S. v. Gilbert*, 130.

§ 154. Case on Appeal

Where attorneys representing defendants in an appeal from consolidated trials file more than one record on appeal, each attorney will be taxed with a portion of the costs of the unnecessary record. *State v. Mc-*

CRIMINAL LAW — Continued

Kenzie, 64; *S. v. Cottingham*, 67; *S. v. Bryson*, 71; *S. v. Ashe*, 74; *S. v. Chavis*, 75; *S. v. Pevia*, 79.

§ 178. Law of the Case

Supreme Court determination that the victim's identification of defendant was admissible became the law of the case at defendant's retrial. *S. v. Jackson*, 187.

DAMAGES

§ 6. Special Damages

Trial court in a personal injury action erred in permitting the jury to consider special damages for loss of corporate profits with respect to a tobacco crop and dairy herd. *Ponder v. Budweiser of Asheville*, 200.

Showing required for recovery of lost profits in breach of contract action. *Gray v. Gray*, 205.

§ 7. Liquidated Damages

Trial court properly applied the rule followed by the N. Y. appellate courts upholding and enforcing the standby fee contained in a loan commitment as liquidated damages or as consideration for the commitment. *Construction Co. v. Bank*, 155.

§ 11. Punitive Damages

Trial court's finding that defendant's conditional tender to plaintiff of only a portion of the sum due under a contract constituted a conversion of the sum due was insufficient to support an award of punitive damages. *Development Corp. v. Alderman-250 Corp.*, 598.

§ 12. Pleading of Damages

Pleadings and evidence did not permit recovery of operating losses by plaintiff for breach of warranty of merchantability of a photographic color enlarger. *Rodd v. Drug Co.*, 564.

§ 13. Competency of Evidence on Issue of Compensatory Damages

Medical bills were properly admitted in evidence. *Evans v. Stiles*, 317.

§ 15. Burden of Proof and Sufficiency of Evidence as to Damages

In an action for breach of contract to allow cultivation of lands, plaintiff's evidence of loss of profits was insufficient. *Gray v. Gray*, 205.

§ 16. Instructions on Measure of Damages

Evidence was insufficient to support instructions that jury could consider disfigurement in arriving at damages for personal injuries. *Ponder v. Budweiser of Asheville*, 200.

Trial court's instructions did not adequately declare and explain the law as to damages recoverable for breach of warranty of merchantability of a photographic color enlarger. *Rodd v. Drug Co.*, 564.

DEATH

§ 1. Proof of Cause of Death in Wrongful Death Action

Trial court properly entered partial summary judgment for plaintiff on the issue of cause of decedent's death where plaintiff offered defendant's plea of guilty to second degree murder of decedent. *Boone v. Fuller*, 107.

§ 7. Damages for Wrongful Death

Jury instructions in a wrongful death action which compelled a verdict for more than nominal damages were improper. *Lentz v. Gardin*, 379.

DIVORCE AND ALIMONY

§ 4. Condonation

Plaintiff did not condone allegedly cruel acts of defendant by remaining in the parties' home. *Privette v. Privette*, 305.

§ 18. Alimony Pendente Lite

Trial court erred in ordering payment of one-half of the parties' joint savings account as alimony pendente lite. *Roberts v. Roberts*, 242.

Trial court in an action for alimony pendente lite erred in ruling on a constitutional question. *Black v. Black*, 403.

§ 22. Jurisdiction and Procedure in Custody and Support Actions

Statutory requirement that the court must find that the party ordered to furnish support has refused to provide adequate support in order for attorney's fees to be awarded applies only in support actions and not in custody or custody and support actions. *Arnold v. Arnold*, 683.

§ 23. Support of Children of the Marriage

N. C. Court erred in giving full faith and credit to Hawaii paternity and child support judgment since the Hawaii court never obtained personal jurisdiction over defendant. *Brondum v. Cox*, 35.

Defendant could not unilaterally reduce the amount of child support payments when one of his children reached majority. *Tilley v. Tilley*, 581.

Award of possession of the home to the wife and minor children for the benefit of the minor children did not constitute a writ of possession and was proper. *Arnold v. Arnold*, 683.

DURESS

Assertion by defendants that they executed two notes to plaintiff in settlement of a dispute as to the amount remaining due for a motel construction project because plaintiff "implicitly" threatened to discontinue work on other projects was insufficient to raise a genuine issue of fact as to duress. *Construction Co. v. Coan*, 731.

EMINENT DOMAIN

§ 2. Acts Constituting a "Taking"

The owner of land which abuts a highway has a special right of easement in the highway for access purposes. *Guyton v. Board of Transportation*, 87.

EMINENT DOMAIN — Continued

§ 14. Judgment in Condemnation Action

Trial court in a condemnation proceeding did not err in awarding respondents $1500 less than the amount of the jury verdict. *Redevelopment Comm. v. Holman,* 395.

EQUITY

§ 2. Laches

Plaintiffs' delay in challenging a rezoning ordinance was not unreasonable and did not work to defendant landowners' disadvantage. *Stutts v. Swaim,* 611.

ESCAPE

§ 1. Elements of the Offense

There was no variance between the indictment charging defendant with failure to return to prison at an appointed time and proof that defendant left prison to clean a chapel and failed to return. *S. v. Eppley,* 217.

EVIDENCE

§ 11. Transactions or Communications With Decedent

A mother's testimony in a wrongful death action concerning treatment of her child by a deceased doctor was not banned by the dead man's statute. *Spillman v. Hospital,* 406.

The death certificate of plaintiff's intestate signed by defendant's intestate was not inadmissible by reason of the dead man's statute. *Ibid.*

The dead man's statute prohibited testimony by a beneficiary under the purported will in a caveat proceeding that testator said the will was just what he wanted. *In re Will of Wadsworth,* 593.

§ 29. Accounts, Ledgers, and Private Writings

Hospital medical records of the treatment of deceased were properly admitted in a wrongful death action. *Spillman v. Hospital,* 406.

§ 44. Nonexpert Testimony as to Health

Medical bills were properly admitted in evidence. *Evans v. Stiles,* 317.

EXECUTORS AND ADMINISTRATORS

§ 6. Title and Control of Assets

Life insurance proceeds and entirety property passed to testator's wife outside his estate and were not liable for payment of the estate's liabilities. *Combs v. Eller,* 30.

Joint savings account transferred by testator in contemplation of death was not available to pay liabilities of the estate until the estate's assets were exhausted. *Ibid.*

EXECUTORS AND ADMINISTRATORS — Continued

§ 14. Order of Sale

The court properly ordered sale of stock bequeathed in trust for testator's sons to pay estate liabilities though testator directed that the stock not be used to pay obligations of the estate. *Combs v. Eller,* 30.

§ 15. Sale of Property to Make Assets; Bids and Confirmation

Trial court did not err in denial of motion to vacate orders of confirmation of a sale of realty to make assets to pay debts of an estate. *Burwell v. Wilkerson,* 110.

§ 18. Claims Against Estate

Direction from a testator that certain property in the estate not be applied to the payment of estate liabilities cannot operate to prevent the payment of debts, taxes and costs of administration which are justly owed. *Combs v. Eller,* 30.

§ 24. Right of Action for Personal Services Rendered Decedent

Evidence was sufficient to permit recovery upon either an express or an implied contract for services rendered plaintiff's deceased sister. *Critcher v. Ogburn,* 182.

FALSE PRETENSE

§ 3. Evidence and Nonsuit

Defendant's false representation of agency for a correspondence school by which defendant obtained money from a prospective student constituted the crime of false pretense, and additional allegation of promise of guaranteed employment was surplusage. *S. v. Rogers,* 298.

FOOD

§ 1. Liability of Manufacturer to Consumer

Plaintiff, whose teeth were injured when he bit down on an unshelled nut packaged in one of defendant's products, failed to show breach of express warranty, breach of implied warranty of merchantability, or negligence by defendant, and strict liability was inapplicable. *Coffer v. Standard Brands,* 134.

FORGERY

§ 2. Prosecution

State's evidence was insufficient to show that the signatures defendant was charged with forging were signed by him without authority. *S. v. Martin,* 512.

FRAUD

§ 9. Pleadings

Plaintiff's allegations that she conveyed her interest in entirety property to her husband because he falsely told her he could not make a will unless her name was taken off the deed was insufficient to state a claim

FRAUD — Continued

for setting aside her deed on the ground of active or constructive fraud. *Moore v. Trust Co.*, 390.

GIFTS

§ 4. Gifts Causa Mortis

Joint savings account transferred by testator in contemplation of death was not available to pay liabilities of the estate until the estate's assets were exhausted. *Combs v. Eller*, 30.

HIGHWAYS AND CARTWAYS

§ 5. Rights of Way

The owner of land which abuts a highway has a special right of easement in the highway for access purposes. *Guyton v. Board of Transportation*, 87.

§ 6. Alteration of Routes and Abandoned Sections

Removal of a portion of a road by defendant Board of Transportation did not amount to an abuse of discretionary authority though plaintiffs contended that the old roadway afforded them the only means of vehicular ingress and egress to and from their property. *Guyton v. Board of Transportation*, 87.

§ 9. Actions Against the Commission

Defendant did not misrepresent the composition and moisture of the soil to be encountered in a highway construction project thereby entitling plaintiff to recover additional compensation. *Bridge v. Highway Comm.*, 535.

Plaintiff could not recover additional compensation for extra work in the building of a road where it failed to comply strictly with the contract bid. *Ibid.*

HOMICIDE

§ 21. Sufficiency of Evidence

Evidence was sufficient for the jury where it tended to show that defendant's companion fired the fatal shots. *S. v. Pevia*, 79.

State's evidence was sufficient for the jury in second degree murder prosecution. *S. v. Chavis*, 75.

§ 23. Instructions in General

Prejudicial error did not result from the trial court's reading the indictment to the jury and advising the jury that the State had elected not to place defendant on trial for murder in the first degree but would place him on trial for murder in the second degree or such other offense as the evidence might warrant. *S. v. Carter*, 59.

§ 27. Instructions on Manslaughter

In a prosecution for first degree murder, testimony by a witness that defendant told her that he and the murder victim had gotten into an

HOMICIDE — Continued

argument prior to the killing was not sufficient to support a charge on voluntary manslaughter. *S. v. Hamrick*, 143.

§ 28. Instructions on Defenses

Trial court in a voluntary manslaughter prosecution sufficiently instructed the jury that the burden of proof with respect to self-defense rested with the State. *S. v. Sprinkle*, 383.

§ 32. Appeal and Review

Defendant's conviction of voluntary manslaughter rendered harmless error in the submission of the question of defendant's guilt of second degree murder. *S. v. Chavis*, 75.

HUSBAND AND WIFE

§ 10. Requisites and Validity of Separation Agreements

A separation agreement was supported by consideration where it was under seal and provided benefits to both parties. *Barnes v. Barnes*, 196.

§ 12. Rescission of Separation Agreement

Separation agreement was not subject to rescission for fraud where plaintiff asserted only that he signed the agreement because he was led to believe that the more agreeable he was the better chance he had of plaintiff coming back to him. *Barnes v. Barnes*, 196.

§ 14. Estates by Entireties

Where a husband pays for land and has the deed made to himself and his wife as tenants by the entirety, the husband's declaration by affidavit that he did not intend to make a gift to his wife is insufficient to rebut the presumption of a gift. *Brice v. Moore*, 365.

INDICTMENT AND WARRANT

§ 13. Bill of Particulars

Trial court in a perjury case properly denied defendant's motion for a bill of particulars. *S. v. Wilson*, 149.

Defendant was not entitled to a bill of particulars by which the State would be required to choose between different versions of the shooting. *S. v. Johnson*, 376.

§ 15. Time for Making Motion to Quash

Trial court did not err in failing to hear defendant's motion made at trial to quash the indictment where the grounds for the motion were not stated and the relief or order sought was not set forth. *S. v. Duncan*, 112.

§ 17. Variance Between Averment and Proof

There was no variance between the indictment charging defendant with failure to return to prison at an appointed time and proof that defendant left prison to clean a chapel and failed to return. *S. v. Eppley*, 217.

INFANTS

§ 11. Abuse and Neglect of Child

Children whose parents wilfully refused to allow them to attend school because they were not taught about Indians in the school were "neglected" within the meaning of G.S. 7A-278(4). *In re McMillan*, 235.

INJUNCTIONS

§ 6. Injunction to Enforce Personal Contractual Obligation

An injunction will issue to prevent unauthorized disclosure and use of trade secrets and confidential information. *Laboratories, Inc. v. Turner*, 686.

§ 13. Grounds for Issuance of Injunction

Trial court properly allowed defendant's motion for preliminary mandatory injunction requiring plaintiff to file a claim for income tax refund based on a provision of a separation agreement. *Stanback v. Stanback*, 322.

INSANE PERSONS

§ 1. Commitment to Hospital

Evidence that respondent drove her car carelessly and recklessly was sufficient to support the trial court's determination that respondent was imminently dangerous to herself or others. *In re Hatley*, 413.

INSURANCE

§ 2. Agents

Trial court erred in concluding that an insurance agent could not impose late charges in any amount on any portion of the overdue credit balance on defendant's open account with plaintiff. *Insurance Agency v. Noland*, 503.

§ 44. Action to Recover Disability and Health Benefits

An employee working reduced hours so his earnings would not affect his right to receive full Social Security benefits was not "employed on a full-time basis" within the meaning of a group hospital, medical and disability insurance policy. *Self v. Assurance Co.*, 558.

§ 77. Auto Theft Policies

Evidence was sufficient for the jury in a prosecution of defendant for presenting a false insurance claim where it tended to show that an automobile allegedly stolen had been destroyed by fire before the insurance policy was issued. *S. v. Martin*, 512.

§ 79.1. Automobile Liability Insurance Rates

Order of the Comr. of Insurance fixing automobile liability insurance rates was unsupported by the evidence. *Comr. of Insurance v. Automobile Rate Office*, 427.

Order by the Comr. of Insurance revising the classifications and rates for motorcycle liability insurance was not supported by substantial

INSURANCE — Continued

evidence or necessary findings of fact. *Comr. of Insurance v. Automobile Rate Office*, 477.

§ 99. Liability Insurance Settlement by Insurer

Defendant's evidence presented a triable issue of fact as to whether a release of defendant's claims and rights against third party defendant was procured through fraud. *Trucks, Inc. v. Bridges*, 355.

§ 116. Fire Insurance Rates

The "deemer provision" of G.S. 58-131.1 will not operate to approve automatically a filing of proposed fire insurance rates in the absence of a hearing required by G.S. 58-27.2(a). *Comr. of Insurance v. Rating Bureau*, 487.

Commissioner of Insurance erred in disapproving rate revisions for automobile physical damage insurance. *Ibid.*

If the Comr. of Insurance, within 60 days of a fire insurance rate filing, gives notice of a public hearing on the filing, the "deemer provision" is stayed pending the hearing and his ruling. *Comr. of Insurance v. Rating Bureau*, 549.

Order of the Comr. of Insurance denying an increase in homeowner's rates was contrary to the law and evidence, was unreasonable and arbitrary, and must be vacated. *Ibid.*

Findings of fact by the Commissioner of Insurance did not support the Commissioner's conclusions of law in an order allowing a tie-down credit of 10% of the total premium for each of the types of mobile home insurance. *Insurance Co. v. Ingram*, 741.

Statute authorizing a tie-down discount of not less than 10% from the premium "otherwise applicable" for mobile home insurance permits a discount only as to the portion of the premium relating to windstorm losses. *Ibid.*

INTEREST

§ 1. Items Drawing Interest in General

A two percent service charge on the unpaid balance of an open account for plumbing supplies did not constitute a "time price" but constituted interest. *Supply, Inc. v. Allen*, 272.

INTOXICATING LIQUOR

§ 2. Duties and Authority of ABC Boards; Beer Permits

Evidence was sufficient to support suspension of a retail beer permit where it tended to show that petitioner allowed a female employee to display her pubic area. *Fay v. Board of Alcoholic Control*, 492.

§ 8. Transportation of Intoxicating Liquor

Statute providing for classification of modes of transportation of alcoholic beverages does not offend the equal protection clause of the Federal or State Constitutions. *S. v. Terry*, 372.

JUDGMENTS

§ 10. Construction and Operation of Consent Judgment

Conveyance of land to defendant in accordance with terms of a consent judgment was not a condition precedent to defendant's personal liability under the judgment for interest and penalties because of defendant's failure as executor to file tax returns. *Price v. Horn,* 10.

§ 17. Void Judgments

Divorce obtained by perjury was not void but was at most voidable. *Stokley v. Stokley,* 351.

§ 27. Setting Aside Judgment for Fraud

Divorce obtained by perjury did not constitute a fraud upon the court and the one-year statute of limitations applied to a motion to set aside the divorce for fraud. *Stokley v. Stokley,* 351.

JURY

§ 2. Special Venires

Trial court did not err in denying defendants' motion for special venire from another county on the ground of publicity and the large number of unsolved crimes in the county. *S. v. Bryson,* 71.

Trial court properly denied defendant's motion for a special venire on the ground of pretrial publicity. *S. v. Jackson,* 187.

Defendant was not prejudiced by remarks between counsel and the trial court made in the jury's presence concerning the case immediately preceding defendant's. *S. v. Vanderhall,* 239.

§ 3. Number of Jurors

Trial court erred in failing to order a mistrial where an alternate juror was in the jury room after the jury had begun deliberations, although defendant declined to make a motion for a mistrial. *S. v. Rowe,* 115.

KIDNAPPING

§ 1. Prosecutions

Trial court in a kidnapping case erred in failing to charge on the provisions of the kidnapping statute which became effective 1 July 1975. *S. v. Wingo,* 123.

LANDLORD AND TENANT

§ 5. Lease of Personal Property

There was a genuine issue of material fact as to whether an option to purchase equipment at the end of the lease period was valid and whether a novation had extinguished such option. *Transportation Systems v. Service, Inc.,* 289.

§ 17. Termination of Lease for Destruction of the Property

Defendant landlord was obligated by terms of its lease agreement to restore leased premises which had been destroyed by fire. *Metal Treating Corp. v. Realty Co.,* 620.

LANDLORD AND TENANT — Continued

§ 19. Rent, and Actions Therefor

Lease provision requiring the lessee to pay an additional rental of a percentage of "all sales" in excess of a certain amount did not apply to sales made by the lessee at another location after the lessee moved out of the leased premises. *Lowe's v. Hunt*, 84.

LARCENY

§ 6. Competency and Relevancy of Evidence

A nonexpert witness may testify as to the value of his personal property. *S. v. Tolley*, 213.

§ 7. Sufficiency of Evidence

Evidence was sufficient for the jury in a prosecution for breaking and entering and larceny where it tended to show that defendants were in possession of items recently stolen from a house which had been broken into. *S. v. Greene*, 507.

§ 8. Instructions

Trial court erred in applying the doctrine of possession of recently stolen property to both defendants. *S. v. Majette*, 120.

In a prosecution for breaking and entering and larceny, trial court erred in instructing the jury that since the State relied entirely on the doctrine of possession of recently stolen property, the jury should return the same verdict in both cases. *S. v. Barnes*, 671.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action

Action to recover for injuries allegedly caused by defective safety device accrued at time of injury and not when safety device was installed. *Shuler v. Dyeing Machine Co.*, 577.

§ 18. Sufficiency of Evidence

Plaintiffs failed to meet burden of repelling the bar of the statute of limitations in an action for breach of a right-of-way agreement. *Poore v. Railway*, 104.

MALICIOUS PROSECUTION

§ 13. Sufficiency of Evidence

Evidence in malicious prosecution case was sufficient to show defendant had probable cause in instituting a prior inebriacy action against plaintiff. *Gray v. Gray*, 205.

MASTER AND SERVANT

§ 10. Duration of Employment and Wrongful Discharge

Superior court had no jurisdiction to review the dismissal of a highway patrolman. *Darnell v. Dept. of Transportation*, 328.

MASTER AND SERVANT — Continued

§ 11. Agreement Not to Engage in Like Employment After Termination of Employment

Plaintiff was not entitled to a preliminary injunction preventing a former employee from working for a competitor as a manager of plasma fractionation, but plaintiff was entitled to a preliminary injunction forbidding the employee from disclosing to the competitor plaintiff's modification of a centrifuge used in plasma fractionation. *Laboratories, Inc. v. Turner*, 686.

§ 34. Employer's Liability for Injuries to Third Parties; Scope of Employment

Trial court properly directed a verdict for defendant employer where defendant employee was acting outside the scope of his authority as agent of the employer, and plaintiff was put on notice to that effect. *Parsons v. Bailey*, 497.

§ 49. "Employees" Within Meaning of Workmen's Compensation Act

A laboratory assistant trainee receiving on-the-job training in a hospital under an agreement between the hospital and a technical institute was an apprenticeship employee within the meaning of the Workmen's Compensation Act. *Wright v. Hospital*, 91.

§ 50. Independent Contractors

A taxicab driver who rented his cab from a taxicab company was an independent contractor and not an employee of the company. *Alford v. Cab Co.*, 657.

§ 56. Causal Relation Between Employment and Injury

Death of a shoe store employee after she was kidnapped from a mall parking lot and robbed by one who knew she sometimes deposited her employer's money in the bank arose out of and in the course of her employment with the store. *Gallimore v. Marilyn's Shoes*, 628.

§ 57. Intoxication of Employee

Benefits under the Workmen's Compensation Act should be foreclosed only when the evidence shows the claimant's intoxication was the sole cause of the accident. *Inscoe v. Industries, Inc.*, 1.

§ 65. Back Injuries

The Industrial Commission erred in finding that, "As plaintiff was picking up his side of the refrigerator, it slipped and he got a catch in his back," and in concluding that plaintiff sustained an injury by accident. *Pulley v. Association*, 94.

§ 77. Review of Award for Change of Condition

Claimant was not entitled to additional recovery under workmen's compensation for medical expenses where he failed to show a change of his condition from the time of the original award by the Industrial Commission. *Shuler v. Talon Div. of Textron*, 570.

§ 80. Rates and Regulations of Compensation Insurers

Workmen's compensation rate proceeding is remanded to the Comr. of Insurance for appropriate findings of fact. *Comr. of Insurance v. Rating and Inspection Bureau*, 332.

MUNICIPAL CORPORATIONS

§ 14. Injuries in Connection With Streets and Sidewalks

Summary judgment was properly entered for the city in an action by a pedestrian for injuries sustained when she fell on a defective sidewalk. *Joyce v. City of High Point*, 346.

§ 30. Zoning Ordinances and Building Permits

A children's treatment center which performed a public governmental function as an agency of the State could operate at its location pursuant to the permitted use clause of plaintiff's zoning ordinance. *Town of Southern Pines v. Mohr*, 342.

Ordinance adopted by defendant city which rezoned land to permit operation of a mobile home park constituted spot zoning and the city exceeded its authority in adopting the ordinance. *Stutts v. Swaim*, 611.

Plaintiff's delay in challenging a rezoning ordinance was not unreasonable and did not work to defendant landowners' disadvantage. *Ibid.*

NARCOTICS

§ 3. Competency of Evidence

Trial court properly found that an officer was an expert in identification of marijuana. *S. v. Clark*, 253.

NEGLIGENCE

§ 18. Contributory Negligence of Minors

Trial court erred in failing to instruct that a minor between the ages of 7 and 14 is presumed incapable of contributory negligence. *Townsend v. Frye*, 634.

§ 29. Sufficiency of Evidence of Negligence

Evidence that defendant instructed retarded intestate to cross a highway was sufficient to show negligence. *Haddock v. Smithson*, 228.

§ 35. Nonsuit for Contributory Negligence

Retarded 14 year old was not contributorily negligent as a matter of law in crossing a highway. *Haddock v. Smithson*, 228.

§ 57. Sufficiency of Evidence and Nonsuit in Actions by Invitees

In an action to recover against a swimming facility proprietor for injuries sustained during horseplay of patrons, trial court properly granted defendant's motion for a directed verdict. *Manganello v. Permastone, Inc.*, 696.

PARENT AND CHILD

§ 5. Right to Earnings of Child and to Recover for Injuries to Child

A finding of contributory negligence on the part of a minor child will bar the mother's action for loss of services and medical expenses. *Townsend v. Frye*, 634.

§ 10. Uniform Reciprocal Enforcement of Support Act

A defendant in a proceeding under the Uniform Reciprocal Enforcement of Support Act is entitled to have a blood grouping test and is

PARENT AND CHILD — Continued

entitled to have the jury pass upon the issue of paternity. *Brondum v. Cox*, 35.

PERJURY

§ 3. Indictment

Trial court in a perjury case properly denied defendant's motion for a bill of particulars. *S. v. Wilson*, 149.

§ 4. Relevancy and Competency of Evidence

Defendant in a perjury prosecution was not prejudiced by the admission of the transcript of defendant's entire testimony at the murder trial at which he allegedly committed perjury. *S. v. Wilson*, 149.

In a prosecution of defendant for perjury in a murder trial, testimony by a State's witness that he had himself testified falsely at the murder trial did not violate the rule against impeachment of one's own witness. *Ibid.*

§ 5. Sufficiency of Evidence

State's evidence was sufficient for the jury in a prosecution for perjury in a murder trial. *S. v. Wilson*, 149.

§ 5.5. Instructions

Materiality of testimony assigned as perjury was a question of law for the court, and court properly instructed jury that allegedly perjured testimony in a murder trial related to significant issues of fact in that trial. *S. v. Wilson*, 149.

PLEADINGS

§ 11. Counterclaims and Cross Actions

Plaintiff's Mecklenburg County action based on false advertising by defendant of defendant's tobacco harvester was a compulsory counterclaim which should have been asserted by plaintiff in defendant's prior action in Bertie County based on false advertising by plaintiff of plaintiff's tobacco harvester. *Manufacturing Co. v. Manufacturing Co.*, 97.

Claim for penalties under the Federal Truth in Lending Act may not be raised as a counterclaim in the creditor's action for the unpaid balance on the debt. *Construction Co. v. Gibson*, 385.

PRINCIPAL AND AGENT

§ 11. Liability of Agent to Third Person

A corporate president who exceeded his authority in executing a contract with plaintiff is personally responsible to plaintiff unless he is absolved of such liability by a contract provision. *Whitten v. AMC/Jeep, Inc.*, 161.

PRIVACY

Superior court had inherent authority to enter a protective order prohibiting public disclosure of information submitted by a telephone com-

PRIVACY — Continued

pany to the Attorney General in an investigation concerning possible misuse of corporate funds by the telephone company. *In re Investigation by Atty. General,* 585.

PROCESS

§ 1. Function, Form, and Requisites of Process

The court acquired no jurisdiction over defendant Thorp Sales Corporation where summons was directed to a named individual as agent for "Executive Square—Thorp Commercial Corporation," and the court was not authorized to permit plaintiff to amend the summons. *Ready Mix Concrete v. Sales Corp.,* 526.

§ 9. Personal Service on Nonresident Individuals in Another State

Nonresidents were not subject to in personam jurisdiction by the courts of this State in an action involving promissory notes executed in another state and assigned to a bank in this State. *Bank v. Funding Corp.,* 172.

PROPERTY

§ 4. Criminal Prosecutions for Malicious Destruction

State's evidence was sufficient for the jury in a prosecution for malicious damage to an SBI automobile by use of explosives. *S. v. Grier,* 281.

QUASI CONTRACTS

§ 2. Action on Implied Contract

Where the complaint pleads both an express contract and an implied contract and there is evidence to support both theories, issues should be submitted to the jury as to both. *Critcher v. Ogburn,* 182.

RECEIVING STOLEN GOODS

§ 6. Instructions

Trial court erred in instructing the jury on "reasonable grounds to believe" goods were stolen where the offense occurred prior to the 1975 amendment to the receiving statute. *S. v. Burchfield,* 128.

REGISTRATION

§ 1. Necessity for Registration and Instruments Within Purview of Statutes

Unrecorded assignment of an oil and gas lease was invalid as to a purchaser for valuable consideration of the lease whose assignment was properly recorded. *Oil Co. v. Pochna,* 360.

RULES OF CIVIL PROCEDURE

§ 4. Process

The court acquired no jurisdiction over defendant Thorp Sales Corporation where summons was directed to a named individual as agent for

RULES OF CIVIL PROCEDURE — Continued

"Executive Square—Thorp Commercial Corporation," and the court was not authorized to permit plaintiff to amend the summons. *Ready Mix Concrete v. Sales Corp.*, 526.

§ 5. Service of Notice

Notice of appeal from a magistrate to district court need not be served by a judicial officer or be accepted by the appellee, but is sufficient if served upon appellee's attorney by mail. *Supply Co. v. McClain*, 132.

§ 6. Time

Trial court in a partition action did not err in denial of appellant's Rule 6(b) motion for an extension of time to plead to crossclaims alleging that appellant had no interest in the property. *Privette v. Privette*, 41.

Notice of hearing of motion for summary judgment was not required where case was called for trial at same session the motion was heard. *Barnes v. Barnes*, 196.

§ 13. Counterclaim

Plaintiff's Mecklenburg County action based on false advertising by defendant of defendant's tobacco harvester was a compulsory counterclaim which should have been asserted by plaintiff in defendant's prior action in Bertie County based on false advertising by plaintiff of plaintiff's tobacco harvester. *Manufacturing Co. v. Manufacturing Co.*, 97.

§ 41. Dismissal of Action

Plaintiff was entitled to voluntary dismissal of his action without prejudice. *Caroon v. Eubank*, 244.

§ 50. Motion for Directed Verdict

Trial court erred in reserving his ruling upon defendants' motions for directed verdict made at the close of plaintiff's evidence until the close of defendants' evidence, and then ruling upon only the evidence offered by plaintiff. *Overman v. Products Co.*, 516.

§ 54. Judgments

Default judgment entered by the trial court which granted relief different in kind from the relief sought was improper. *Tifco, Inc. v. Underwriters Group, Inc.*, 641.

§ 55. Default

Trial court in a partition proceeding did not err in denial of appellant's Rule 55(d) motion to set aside default against him as to crossclaims alleging he had no interest in the property. *Privette v. Privette*, 41.

§ 59. Amendment of Judgment

Trial court in a condemnation proceeding did not err in awarding respondents $1500 less than the amount of the jury verdict. *Redevelopment Comm. v. Holman*, 395.

§ 60. Relief From Judgment or Order

Divorce obtained by perjury was not void and did not constitute a fraud upon the court within the meaning of Rule 60, and the one-year

RULES OF CIVIL PROCEDURE — Continued

statute of limitations applied to a motion to set aside the divorce for fraud. *Stokley v. Stokley*, 351.

Defendant's motion to set aside a judgment entered against him was properly denied though defendant's failure to file answer was due to excusable neglect and though defendant had a meritorious defense, since the motion was not made within one year of the entry of judgment, and since plaintiff could not be placed in the same position held by him prior to entry of the judgment. *Norton v. Sawyer*, 420.

SCHOOLS

§ 1. Establishment and Supervision

Evidence was insufficient for the jury on the issue of defendants' guilt of operating a correspondence school in this State without obtaining a license and executing a bond. *S. v. Rogers*, 298.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Items seized incident to defendant's arrest were admissible where the arrest was made with probable cause even though the arrest was in violation of N. C. statute because made by a city officer more than one mile outside the city boundary. *S. v. Mangum*, 311.

§ 4. Search Under Warrant

Evidence was sufficient to support trial court's finding that a search pursuant to a warrant of a vehicle and its driver was completed before the search of defendant passenger who was not named in the warrant. *S. v. Watlington*, 101.

TAXATION

§ 25. Ad Valorem Taxes

The Property Tax Commission properly determined that carpets, blinds and appliances owned by petitioner were subject to discovery and were properly appraised and assessed for taxation. *In re Appeal of Matthews*, 401.

§ 26. Franchise Taxes

A corporation was entitled to have deferred income tax on installment sales deducted from deferred gross profit from installment sales in determining "surplus" for the purpose of computing the corporation's franchise tax. *Realty Corp. v. Coble, Sec. of Revenue*, 261.

§ 27. Inheritance, Estate, and Gift Taxes

U. S. Treasury bonds should have been valued for inheritance tax purposes at the same value as they were accepted in satisfaction of federal estate taxes. *Stanback v. Coble*, 533.

TELEPHONE AND TELEGRAPH COMPANIES

§ 1. Control and Regulation

In a telephone general rate case, the Utilities Commission was not required to consider intervenor county's claim that it was entitled to have

TELEPHONE AND TELEGRAPH COMPANIES — Continued

extended area service connecting the county seat exchange with other exchanges serving telephone customers in the county. *Utilities Comm. v. County of Harnett*, 24.

TORTS

§ 7. Release From Liability

Plaintiff's plea of a release obtained by his insurance carrier as a bar to defendant's counterclaim in a former action between the parties, although now withdrawn by plaintiff, constituted a ratification of the release and barred plaintiff's present action against defendant. *Fowler v. McLean*, 393.

TRIAL

§ 35. Instructions on Burden of Proof

Trial court was not required to define the term "greater weight of the evidence" in the absence of a special request. *In re Will of Wadsworth*, 593.

TRUSTS

§ 13. Creation of Resulting Trust

In an action to reform a deed to show that the grantee took as trustee under a parol trust for other children of the grantor, trial court properly excluded testimony that, at some time after the title to the land had been transferred to the grantee, the witness heard the grantor tell the grantee she wanted the land divided equally among other children. *Wall v. Sneed*, 680.

UNFAIR COMPETITION

Statute prohibiting unfair or deceptive acts or practices in the conduct of any trade or commerce applies to collection practices of a department store. *Edmisten, Atty. Gen. v. Penney Co.*, 368.

Plaintiff was not entitled to a preliminary injunction preventing a former employee from working for a competitor as a manager of plasma fractionation, but plaintiff was entitled to a preliminary injunction forbidding the employee from disclosing to the competitor plaintiff's modification of a centrifuge used in plasma fractionation. *Laboratories, Inc. v. Turner*, 686.

UNIFORM COMMERCIAL CODE

§ 15. Warranties

Plaintiff's evidence that an unshelled filbert was found in dry roasted mixed nuts packaged by defendant was insufficient to show a breach of express warranty or breach of implied warranty of merchantability. *Coffer v. Standard Brands*, 134.

UNIFORM COMMERCIAL CODE — Continued

§ 21. Buyer's Remedies

Pleadings and evidence did not permit recovery of operating losses by plaintiff for breach of warranty of merchantability of a photographic color enlarger. *Rodd v. Drug Co.*, 564.

Trial court's instructions did not adequately declare and explain the law as to damages recoverable for breach of warranty of merchantability of a photographic color enlarger. *Ibid.*

§ 74. Enforcement of Security Interest

A bank's security interest in equipment continued after the purchaser's transfer of the equipment to a corporation. *Bank v. Construction Co.*, 220.

USURY

§ 1. Contracts and Transactions Usurious

A two percent per month service charge on the unpaid balance of an open account for plumbing supplies constituted interest and violated the one and one-half percent ceiling allowed by G.S. 24-11. *Supply, Inc. v. Allen*, 272.

UTILITIES COMMISSION

§ 6. Hearings and Orders; Rates

Utilities Commission was without power to approve a monthly availability charge of $3 while the uniform contract between the utility and property owner called for a monthly charge of $5, since $5 was also the sum of the minimum rate to user customers of the utility. *Utilities Comm. v. Utility Co.*, 336.

The Utilities Commission did not exceed its authority in entering an order allowing a power company to apply a temporary surcharge to recover its increased fuel costs incurred during two previous months while a prior fuel clause was in effect but not yet collected from its customers when such fuel clause was terminated by G.S. 62-134(e). *Utilities Comm. v. Edmisten*, 459.

§ 7. Services

In a telephone general rate case, the Utilities Commission was not required to consider intervenor county's claim that it was entitled to have extended area service connecting the county seat exchange with other exchanges serving telephone customers in the county. *Utilities Comm. v. County of Harnett*, 24.

VENDOR AND PURCHASER

§ 11. Abandonment and Cancellation of Contract

Assignees of the purchasers of land were not entitled to rescind the sale on the ground the developers did not comply with the Interstate Land Sales Full Disclosure Act. *Konopisos v. Phillips*, 209.

WILLS

§ 22. Mental Capacity

Witnesses in a caveat proceeding were properly permitted to give opinions regarding the mental condition of testator within a reasonable time before and after execution of his purported will. *In re Will of Wadsworth,* 593.

The dead man's statute prohibited testimony by a beneficiary under the purported will in a caveat proceeding that testator said the will was just what he wanted. *Ibid.*

§ 31. Transmittable Estate

Life insurance proceeds and entirety property passed to testator's wife outside his estate and were not liable for payment of the estate's liabilities. *Combs v. Eller,* 30.

WITNESSES

§ 1. Competency of Witness

Defendant was not prejudiced by testimony of a witness not on the list furnished defendant by the State. *S. v. Hamrick,* 143.

§ 10. Attendance

Trial court did not err in limiting its order for production of out-of-state alibi witnesses to five witnesses. *S. v. Jackson,* 187.

WORD AND PHRASE INDEX

ACCESSORY AFTER THE FACT

Unsuccessful attempt to aid felon in evading the law, *S. v. Martin*, 166.

ACCOMPLICE

Instruction that witness was an accomplice, *S. v. Dupree*, 232.

ACCORD AND SATISFACTION

Dispute of account for motel project, *Construction Co. v. Coan*, 731.

ADMINISTRATIVE DECISION

Review of highway patrolman's dismissal, *Darnell v. Dept. of Transportation*, 328.

AGENT

Acting outside scope of authority, *Parson v. Bailey*, 497.

ALCOHOLIC BEVERAGES

Beer permit suspended for employee's display of pubic area, *Fay v. Board of Alcoholic Control*, 492.

Transportation in for hire vehicle, *S. v. Terry*, 372.

ALIMONY

See Divorce and Alimony this Index.

ALTERNATE JUROR

In jury room during deliberations, *S. v. Rowe*, 115.

APPEAL

Serving notice of appeal from magistrate, *Supply Co. v. McClain*, 132.

State's appeal from special verdict of not guilty, *S. v. Gilbert*, 130.

APPRENTICE EMPLOYEE

Laboratory assistant trainee in hospital, *Wright v. Hospital*, 91.

ARRAIGNMENT

Reading indictment before jury, *S. v. Carter*, 59.

ASSAULT

Conspiracy to commit, *S. v. Puryear*, 719.

ATTORNEYS

Costs of unnecessary record on appeal taxed against, *S. v. McKenzie*, 65; *S. v. Cottingham*, 67; *S. v. Bryson*, 71; *S. v. Ashe*, 74; *S. v. Chavis*, 75; *S. v. Pevia*, 79.

ATTORNEY'S FEES

Necessity for finding of refusal to furnish child support, *Arnold v. Arnold*, 683.

Provision for in sales receipt and invoice, *Supply, Inc. v. Allen*, 272.

Provision not filled in when contract signed, *Construction Co. v. Gibson*, 385.

Tax deduction required by separation agreement, *Stanback v. Stanback*, 322.

AUTOMOBILE LIABILITY INSURANCE

Revision of classifications and rates for motorcycles, *Comr. of Insurance v. Automobile Rate Office*, 477.

AUTOMOBILE PHYSICAL DAMAGE INSURANCE

Erroneous disapproval of rate revisions, *Comr. of Insurance v. Rating Bureau*, 487.

AUTOMOBILE PHYSICAL DAMAGE INSURANCE — Continued

Necessity for public hearing, *Comr. of Insurance v. Rating Bureau*, 487.

AUTOMOBILES

Pedestrian's contributory negligence as cause of wrongful death, *Thornton v. Cartwright*, 674.

Plaintiff's negligence as cause of sudden emergency, *Foy v. Bremson*, 662.

Unlighted car parked on highway, *Williamson v. Basinger*, 50.

AVAILABILITY CHARGE

Disapproval by Utilities Commission, *Utilities Comm. v. Utility Co.*, 336.

BACK INJURY

Ruptured disc while lifting refrigerator, *Pulley v. Association*, 94.

BANISHMENT

As condition for suspended sentence, *S. v. Culp*, 398.

BEER PERMIT

Suspension for employee's display of pubic area, *Fay v. Board of Alcoholic Control*, 492.

BILL OF PARTICULARS

Choice by State between versions of shooting, *S. v. Johnson*, 376.

BLACK BEARS

Statute prohibiting caging, *Cannady v. Wildlife Resources Comm.*, 247.

BLOOD GROUPING TEST

Uniform Reciprocal Enforcement of Support Act proceeding, *Brondum v. Cox*, 35.

BONDS

Valuation for inheritance taxes, *Stanback v. Coble*, 533.

BREACH OF CONTRACT

Recovery for loss of profits, *Gray v. Gray*, 205.

BREAKING AND ENTERING

Consent of occupant, *S. v. Tolley*, 213.

BREATHALYZER TEST

Delay between arrest and test, *S. v. Basinger*, 45.

CARELESS AND RECKLESS DRIVING

Respondent imminently dangerous to herself and others, *In re Hatley*, 413.

CATALOG NUMBERING SYSTEM

Consent judgment prohibiting using, *Equipment Co. v. Weant*, 191.

CENTRIFUGE

Prohibiting disclosure of modification of, *Laboratories, Inc. v. Turner*, 686.

CHILDREN'S TREATMENT CENTER

Permitted use under zoning ordinance, *Town of Southern Pines v. Mohr*, 342.

CHILD SUPPORT

Award of possession of home, *Arnold v. Arnold*, 683.

Revocation of suspended sentence for failure to pay, *S. v. Cash*, 677.

Uniform Enforcement Act, right to blood grouping test, *Brondum v. Cox*, 35.

CHILD SUPPORT — Continued

Unilateral reduction in payment by defendant, *Tilley v. Tilley*, 581.

CLERK

Disposition of funds upon voluntary dismissal, *Caroon v. Eubank*, 244.

CO-CONSPIRATORS

Admissibility of statements by, *S. v. Puryear*, 719.

COMPULSORY COUNTERCLAIM

False advertising of tobacco harvester, *Manufacturing Co. v. Manufacturing Co.*, 97.

CONDEMNATION

Verdict reduced by court, *Redevelopment Comm. v. Holman*, 395.

CONDONATION

Occupation of house with husband, *Privette v. Privette*, 305.

CONFESSIONS

Conflicting confession not impeachment of State's witnesses, *S. v. Johnson*, 376.

Intoxication of defendant when arrested, *S. v. Mangum*, 311; when confession made, *S. v. Hamrick*, 143.

Made after warrantless arrest, *S. v. Campbell*, 652.

Officer's admonition to tell the truth, *S. v. Raines*, 176.

Waiver of right to attorney after initial request for attorney, *S. v. Raines*, 176.

CONSOLIDATION FOR TRIAL

Consideration of guilt or innocence of each defendant separately, *S. v. Cottingham*, 68.

CONSOLIDATION FOR TRIAL — Continued

Defendants charged with same crime, *S. v. Greene*, 507.

Sufficiency of written motion, *S. v. Majette*, 120.

Unwritten motion for, *S. v. Cottingham*, 68; *S. v. Bryson*, 71.

CONSPIRACY

To commit assault, *S. v. Puryear*, 719.

CONTEMPT OF COURT

Compliance with terms of consent judgment, *Equipment Co. v. Weant*, 191.

CONTRACTS

Acceptance of offers to lease heavy equipment, *Leasing Associates v. Rowland*, 590.

Corporation's contract in excess of president's authority, *Whitten v. AMC/Jeep, Inc.*, 161.

Division of profits from sale of commercial property, *Development Corp. v. Alderman-250 Corp.*, 598.

Duration for reasonable time, *Development Corp. v. Alderman-250 Corp.*, 598.

Landscaping services, *Alligood v. Henning*, 126.

Option to purchase leased equipment, *Transportation Systems v. Service, Inc.*, 289.

Place of last act determines where made, *Construction Co. v. Bank*, 155.

Repair of truck, *Trucks, Inc. v. Bridges*, 355.

Services rendered decedent, *Critcher v. Ogburn*, 182.

Survey for construction loan, time for obtaining, *Mosley v. Savings and Loan Assoc.*, 522.

Wrongful interference with performance, *Gudger v. Furniture, Inc.*, 387.

CONTRIBUTORY NEGLIGENCE

Minor between age of 7 and 14 presumed incapable, *Townsend v. Frye*, 634.

CORPORATIONS

Contract in excess of president's authority, *Whitten v. AMC/Jeep, Inc.*, 161.

CORRESPONDENCE SCHOOL

False pretense of agency for, *S. v. Rogers*, 298.

Operating without license and bond, *S. v. Rogers*, 298.

COST BASIS

Contract to sell property, *Development Corp. v. Alderman-250 Corp.*, 598.

CULTIVATION OF LANDS

Breach of contract, *Gray v. Gray*, 205.

DAMAGES

Instruction in wrongful death action, *Lentz v. Gardin*, 379.

Special damages —

loss of profits from tobacco crops and dairy herd, *Ponder v. Budweiser of Asheville*, 200.

operating losses from breach of warranty, *Rodd v. Drug Co.*, 564.

DEAD MAN'S STATUTE

Admissibility of death certificate, *Spillman v. Hospital*, 406.

Deceased doctor's treatment of child, *Spillman v. Hospital*, 406.

Statement by decedent to interested witness, *In re Will of Wadsworth*, 593.

DEATH CERTIFICATE

No ban of dead man's statute, *Spillman v. Hospital*, 406.

DECEASED WITNESS

Transcript of testimony at former trial, *S. v. Jackson*, 187.

DEEMER PROVISION

Necessity for public hearing before applicability of, *Comr. of Insurance v. Rating Bureau*, 487.

Stay upon notice of public hearing, *Comr. of Insurance v. Rating Bureau*, 549.

DEFAULT JUDGMENT

Relief granted different from relief sought, *Tifco, Inc. v. Underwriters Group, Inc.*, 641.

DIRECTED VERDICT

Ruling based on plaintiff's evidence, *Overman v. Products Co.*, 516.

DISCOVERY

Property not listed for taxation, *In re Appeal of Matthews*, 401.

DIVORCE AND ALIMONY

Alimony pendente lite, half of joint savings account, *Roberts v. Roberts*, 242.

Divorce obtained by perjury, statute of limitations, *Stokley v. Stokley*, 351.

Pendente lite hearing, constitutionality of husband's right to entirety profits, *Black v. Black*, 403.

DRIVER'S LICENSE

Burden of proof to show knowledge of revocation, *S. v. Chester*, 224.

Driving while license suspended, *S. v. Chester*, 224.

DRIVING UNDER THE INFLUENCE

Driving with blood alcohol content .10% as lesser offense, *S. v. Basinger*, 45.

Failure to instruct on reckless driving, *S. v. Burrus*, 250.

DUE PROCESS

Failure to inform defendant of evidence, *S. v. Pevia*, 79.

DUNCRAIG MANOR

Operation within area covered by plaintiff's zoning ordinance, *Town of Southern Pines v. Mohr*, 342.

DURESS

Threat to breach contract, *Construction Co. v. Coan*, 731.

EASEMENT

Access to highway, *Guyton v. Board of Transportation*, 87.

ENERGY CRISIS

As basis for reduction in automobile liability insurance rates, *Comr. of Insurance v. Automobile Rate Office*, 427.

ENTIRETY PROPERTY

Purchase by husband, presumption of gift to wife, *Brice v. Moore*, 365.

ESCAPE

Failure of inmate to return from cleaning chapel, *S. v. Eppley*, 217.

ESTATE TAXES

Liability of executor for interest and penalties, *Price v. Horn*, 10.

ESTATES

Liability of life insurance and entirety property for estate obligations, *Combs v. Eller*, 30.

Sale of land to make assets, motion to set aside confirmation, *Burwell v. Wilkerson*, 110.

Sale of trust assets to pay liabilities, *Combs v. Eller*, 30.

EXECUTORS

Failure to pay estate taxes, *Price v. Horn*, 10.

EXPLOSIVES

Injury to SBI agent, *S. v. Grier*, 281.

EXPRESSION OF OPINION

Instruction that witness was an accomplice, *S. v. Dupree*, 232.

EXTENDED AREA SERVICE

Claim in telephone rate case, *Utilities Comm. v. County of Harnett*, 24.

FAMILY PURPOSE DOCTRINE

Motor bike operated by minor, *Williams v. Trust Co.*, 18.

FILBERT NUT

Manufacturer's failure to shell, *Coffer v. Standard Brands*, 134.

FINANCE CHARGE

Open account with insurance agent, *Insurance Agency v. Noland*, 503.

FIRE INSURANCE RATES

Increase in homeowners rates, *Comr. of Insurance v. Rating Bureau*, 549.

Stay of deemer provision upon notice of public hearing, *Comr. of Insurance v. Rating Bureau*, 549.

FORGERY

Signature written without authority, *S. v. Martin*, 512.

FOR HIRE VEHICLE

Distinction in transportation of alcoholic beverages, *S. v. Terry*, 372.

FRANCHISE TAX

Deduction for deferred income tax on installment sales, *Realty Corp. v. Coble*, 261.

FRAUD

Conveyance of entirety interest to husband, *Moore v. Trust Co.*, 390.

FRAUD UPON THE COURT

Divorce obtained by perjury is not, *Stokley v. Stokley*, 351.

FUEL COSTS

Surcharge by power company, *Utilities Comm. v. Edmisten*, 459.

FULL FAITH AND CREDIT

Foreign judgment determining paternity, *Brondum v. Cox*, 35.

GIFT

In contemplation of death, *Combs v. Eller*, 30.

GROUP HOSPITAL AND DISABILITY INSURANCE

Person working reduced hours not full time employee, *Self v. Assurance Co.*, 558.

HABITUAL OFFENDER STATUTE

Constitutionality of, *S. v. Freedle*, 118.

HAWAII

Judgment determining paternity, *Brondum v. Cox*, 35.

HEARSAY

Contents of record in another state, *S. v. Rogers*, 298.

Statement by defendant or another, *S. v. Cox*, 54.

Third party's confession to crime, *S. v. Vanderhall*, 239.

HEAVY EQUIPMENT

Acceptance of offers to lease, *Leasing Associates v. Rowland*, 590.

HIGHWAY COMMISSION

Hearing by State Highway Administrator prerequisite in claim against, *Bridge Co. v. Highway Comm.*, 535.

HIGHWAY PATROLMAN

Review of administrative decision to dismiss, *Darnell v. Dept. of Transportation*, 328.

HIGHWAYS

Abutting landowner's right of access, *Guyton v. Board of Transportation*, 87.

Instruction to retarded intestate to cross, *Haddock v. Smithson*, 228.

No misrepresentation as to soil conditions, *Bridge Co. v. Highway Comm.*, 535.

Removal by Board of Transportation, *Guyton v. Board of Transportation*, 87.

HOMEOWNERS INSURANCE RATES

Erroneous denial of increase in rates, *Comr. of Insurance v. Rating Bureau*, 549.

Stay of deemer provision upon notice of public hearing, *Comr. of Insurance v. Rating Bureau*, 549.

HORSEPLAY

In swimming pool, *Manganello v. Permastone, Inc.*, 696.

HOSPITAL INSURANCE

Person working reduced hours not full time employee, *Self v. Assurance Co.*, 558.

HOSPITAL RECORDS

Admissibility in wrongful death action, *Spillman v. Hospital*, 406.

IDENTIFICATION OF DEFENDANT

Law of the case, *S. v. Jackson*, 187.

INCOME TAXES

Claim for tax refund required by separation agreement, *Stanback v. Stanback*, 322.

INCRIMINATING STATEMENTS

See Confessions this Index.

INDEPENDENT CONTRACTOR

Taxicab driver as, *Alford v. Cab Co.*, 657.

INDIANS

Children kept out of public school, *In re McMillan*, 235.

INDICTMENT

Reading before jury, *S. v. Carter*, 59.

INEBRIACY ACTION

Probable cause to institute action, *Gray v. Gray*, 205.

INFANTS

Operation of motorbike, *Williams v. Trust Co.*, 18.

INFANTS — Continued

Parents' prohibition against public school attendance, *In re McMillan*, 235.

Presumption of incapability of contributory negligence, *Townsend v. Frye*, 634.

INHERITANCE TAXES

Valuation of U. S. Treasury bonds, *Stanback v. Coble*, 533.

INJUNCTIONS

Claim for tax refund required by separation agreement, *Stanback v. Stanback*, 322.

IN PERSONAM JURISDICTION

Hawaii court's determination of paternity of N. C. defendant, *Brondum v. Cox*, 35.

Nonresident defendants, notes executed in another state, *Bank v. Funding Corp.*, 172.

INSANE PERSONS

Imminent danger by reckless driving, *In re Hatley*, 413.

INSTRUCTIONS

Written instructions on elements of crimes, *S. v. Majette*, 120; *S. v. Mangum*, 311.

INSURANCE

Automobile liability insurance —
reduction of rates, *Comr. of Insurance v. Automobile Rate Office*, 427.
revision of classifications and rates for motorcycles, *Comr. of Insurance v. Automobile Rate Office*, 477.

Automobile physical damage insurance —
erroneous disapproval of rate revisions, *Comr. of Insurance v. Rating Bureau*, 487.

INSURANCE — Continued

necessity for public hearing, *Comr. of Insurance v. Rating Bureau*, 487.

False claim for stolen vehicle, *S. v. Martin*, 512.

Finance charge on open account, *Insurance Agency v. Noland*, 503.

Fire insurance rates —

increase in homeowners rates, *Comr. of Insurance v. Rating Bureau*, 549.

stay of deemer provision upon notice of public hearing, *Comr. of Insurance v. Rating Bureau*, 549.

Hospital insurance, person working reduced hours not full time employee, *Self v. Assurance Co.*, 558.

Life insurance, liability for estate obligations, *Combs v. Eller*, 30.

Release executed by insured, *Trucks, Inc. v. Bridges*, 355.

INTEREST

Service charge on account with plumbing supplier, *Supply, Inc. v. Allen*, 272.

INTERESTED WITNESS

Defendant's uncle, instruction improper, *S. v. Lamb*, 255.

INTERSTATE LAND SALE

Failure to file disclosure information, rights of assignees of purchasers, *Konopisos v. Phillips*, 209.

INTOXICATION

Cause of accident on job, *Inscoe v. Industries, Inc.*, 1.

Incriminating statements made during, *S. v. Hamrick*, 143.

INVITED ERROR

Damages for breach of contract, *Development Corp. v. Alderman-250 Corp.*, 598.

JUDGMENTS

Time limit for motion to set aside, *Norton v. Sawyer*, 420.

JURISDICTION

Notes executed in another state, no in personam jurisdiction over nonresident, *Bank v. Funding Corp.*, 172.

JURY

Alternate juror in jury room, *S. v. Rowe*, 115.

Court's remarks in presence of, *S. v. Vanderhall*, 239.

JURY INSTRUCTIONS

Written instructions on elements of crimes, *S. v. Majette*, 120; *S. v. Mangum*, 311.

KIDNAPPING

Failure to charge on new statute, *S. v. Wingo*, 123.

Shoe store employee in parking lot, *Gallimore v. Marilyn's Shoes*, 628.

LABORATORY ASSISTANT TRAINEE

Apprentice employee at hospital, *Wright v. Hospital*, 91.

LACHES

Delay in challenging rezoning ordinance, *Stutts v. Swaim*, 611.

LANDSCAPING SERVICES

Oral contract for, *Alligood v. Henning*, 126.

LARCENY

Possession of recently stolen items, *S. v. Greene*, 507.

LAST CLEAR CHANCE

No damages awarded defendant, *Williamson v. Basinger*, 50.

LAW OF THE CASE

In-court identification testimony, *S. v. Jackson*, 187.

LEADING QUESTIONS

Asked by court, *Burwell v. Wilkerson*, 110.

LEASE

Duty of lessor to restore premises destroyed by fire, *Metal Treating Corp. v. Realty Co.*, 620.

Necessity for registration of oil and gas lease, *Oil Co. v. Pochna*, 360.

Option to purchase leased equipment, *Transportation Systems v. Service, Inc.*, 289.

Percentage of sales as rent, sales at another location, *Lowe's v. Hunt*, 84.

LEGAL FEES

Wrongful interference with contract for, *Gudger v. Furniture, Inc.*, 387.

LIFE INSURANCE

Liability for estate obligations, *Combs v. Eller*, 30.

LOAN COMMITMENT

Standby fee as liquidated damages, *Construction Co. v. Bank*, 155.

LOST PROFITS

Recovery in breach of contract action, *Gray v. Gray*, 205.

MAGISTRATE

Notice of appeal to district court, *Supply Co. v. McClain*, 132.

MALICIOUS PROSECUTION

Burden of proving probable cause, *Gray v. Gray*, 205.

Probable cause to institute inebriacy action, *Gray v. Gray*, 205.

MALPRACTICE

Treatment of child with appendicitis, *Spillman v. Hospital*, 406.

MANSLAUGHTER

Conviction for rendered second degree murder submission harmless, *S. v. Chavis*, 75.

MERCY

Instructions on jury recommendation, *S. v. Jordan*, 529.

MINIMUM CONTACTS

Notes executed in another state, no jurisdiction over nonresident, *Bank v. Funding Corp.*, 172.

MINORS

See Infants this Index.

MOBILE HOMES

Tie-down discount, *Insurance Co. v. Ingram*, 741.

Tract as spot zoning, *Stutts v. Swaim*, 611.

MOTEL CONSTRUCTION PROJECT

Accord and satisfaction, *Construction Co. v. Coan*, 731.

MOTORBIKE

Operation of by minor, *Williams v. Trust Co.*, 18.

MOTORCYCLES

Revision of classification and rates for, *Comr. of Insurance v. Automobile Rate Office*, 477.

NEGLECTED CHILDREN

Keeping children out of public school, *In re McMillan*, 235.

NOTICE OF APPEAL

Method of serving notice of appeal from magistrate, *Supply Co. v. McClain*, 132.

NOVATION

Option to purchase leased equipment, *Transportation Systems v. Service, Inc.*, 289.

NUTS

Manufacturer's failure to shell, *Coffer v. Standard Brands*, 134.

OPEN ACCOUNT

With insurance agent, finance charge proper, *Insurance Agency v. Noland*, 503.

PARKING

Not guilty verdict, right of State to appeal, *S. v. Gilbert*, 130.

PARKING LOT

Failure of pedestrian to see backing car in, *Evans v. Stiles*, 317.

PAROL TRUST

Evidence of promise after passage of title, *Wall v. Sneed*, 680.

PARTITION

Denial of motion for extension to plead to cross claim, *Privette v. Privette*, 41.

PATERNITY

Blood grouping test action under Uniform Act, *Brondum v. Cox*, 35.

PEDESTRIAN

Contributory negligence of as cause of wrongful death, *Thornton v. Cartwright*, 674.

Failure to see backing car in parking lot, *Evans v. Stiles*, 317.

Injury caused by defective sidewalk, *Joyce v. City of High Point*, 346.

PERJURY

Divorce obtained by, statute of limitations, *Stokley v. Stokley*, 351.

Sufficiency of evidence, *S. v. Wilson*, 149.

PHOTOGRAPHIC COLOR ENLARGER

Operating losses from breach of warranty, *Rodd v. Drug Co.*, 564.

PLASMA FRACTIONATION

Prohibiting competitor's employment of former employee, *Laboratories, Inc. v. Turner*, 686.

PRIOR CRIMES

Admission of, opportunity to explain, *S. v. Chandler*, 646.

PRISONER

Failure to return from cleaning chapel, *S. v. Eppley*, 217.

PRIVACY

Prohibiting public disclosure of information submitted to Attorney General, *In re Investigation by Attorney General*, 585.

PROCESS

Action against corporation, summons directed to individual, *Ready Mix Concrete v. Sales Corp.*, 526.

PROTECTIVE ORDER

Prohibiting public disclosure of information submitted to Attorney General, *In re Investigation by Attorney General*, 585.

PUBLIC GOVERNMENTAL FUNCTION

Operation of children's treatment center, *Town of Southern Pines v. Mohr*, 342.

PUNISHMENT

See Sentence this Index.

QUASI-CONTRACTS

Services rendered decedent, *Critcher v. Ogburn*, 182.

REAL ESTATE AGENT

Purchaser procured by third party, right to commissions, *Beasley-Kelso Associates v. Tenney*, 708.

RECEIVING STOLEN GOODS

Reasonable grounds for belief goods stolen, *S. v. Burchfield*, 128.

RECENT POSSESSION DOCTRINE

Erroneous application to both defendants, *S. v. Majette*, 120.

Instructions to return same verdict for breaking and entering and larceny, *S. v. Barnes*, 671.

Possession as evidence of larceny, *S. v. Greene*, 507.

RECKLESS DRIVING

Failure to instruct on in driving under the influence case, *S. v. Burrus*, 250.

RECORD ON APPEAL

Taxing of costs against attorneys for unnecessary record on appeal, *S. v. McKenzie*, 65; *S. v. Cottingham*, 67; *S. v. Bryson*, 71; *S. v. Ashe*, 74; *S. v. Chavis*, 75; *S. v. Pevia*, 79.

REFRESHING MEMORY

Reading written statements, *S. v. Greene*, 507.

REFRIGERATOR

Injury to back while lifting, *Pulley v. Association*, 94.

REGISTRATION

Oil and gas lease, *Oil Co. v. Pochna*, 360.

RELEASE, PLEA OF

Effect of later withdrawal of, *Fowler v. McLean*, 393.

RENT

Percentage of sales as rent, sales at another location, *Lowe's v. Hunt*, 84.

RES IPSA LOQUITUR

Inapplicable to food processing, *Coffer v. Standard Brands*, 134.

RESISTING ARREST

Different verdict as to two officers, *S. v. Chandler*, 646.

RETARDED PERSON

Instruction to cross highway, *Haddock v. Smithson*, 228.

ROAD BUILDING

No misrepresentation as to soil conditions, *Bridge Co. v. Highway Comm.*, 535.

SBI AGENT

Injury to from explosives, *S. v. Grier*, 281.

SCHOOL ATTENDANCE

Parents' refusal to send Indian children to school, *In re McMillan*, 235.

SEARCHES AND SEIZURES

Arrest constitutional but in violation of N. C. law, *S. v. Mangum*, 311.

Vehicle passenger not named in warrant, *Burwell v. Wilkerson*, 110.

SECOND DEGREE MURDER

Manslaughter conviction rendered submission harmless, *S. v. Chavis*, 75.

SECURITY INTEREST

Continuance after transfer of secured property, *Bank v. Construction Co.*, 220.

SELF-DEFENSE

Burden of proof, *S. v. Sprinkle*, 383.

SELF-INCRIMINATION

Testimony by defendant's uncle, instruction on interested witness, *S. v. Lamb*, 255.

SENTENCE

Banishment as condition for suspending, *S. v. Culp*, 398.

SEPARATION AGREEMENT

Claim for tax refund for attorneys' fees required by, *Stanback v. Stanback*, 322.

Failure to show fraud, *Barnes v. Barnes*, 196.

SHOTGUN

Brandishing at homicide scene, *S. v. Pevia*, 79.

SIDEWALK

Injury to pedestrian caused by defect in, *Joyce v. City of High Point*, 346.

SOIL CONDITIONS

No misrepresentation in road building, *Bridge Co. v. Highway Comm.*, 535.

SPECIAL DAMAGES

Loss of profits from tobacco crops and dairy herd, *Ponder v. Budweiser of Asheville*, 200.

Operating losses from breach of warranty, *Rodd v. Drug Co.*, 564.

SPEEDY TRIAL

Failure to show denial of, *S. v. Eppley*, 217.

SPOT ZONING

Tract rezoned for mobile homes, *Stutts v. Swaim*, 611.

STANDBY FEE

In loan commitment, *Construction Co. v. Bank*, 155.

STATUTE OF LIMITATIONS

Divorce obtained by perjury, *Stokley v. Stokley*, 351.

Failure of proof, *Poore v. Railway*, 104.

STOCKS

Sale to pay estate liabilities, *Combs v. Eller*, 30.

SUDDEN EMERGENCY

Plaintiff's negligence as cause, *Foy v. Bremson*, 662.

SUMMONS

Action against corporation, summons directed to individual, *Ready Mix Concrete v. Sales Corp.*, 526.

SURCHARGE

Recovery of fuel costs by power company, *Utilities Comm. v. Edmisten*, 459.

SURVEY

Contract to procure, *Mosley v. Savings and Loan Assoc.*, 522.

SUSPENDED SENTENCE

Banishment as condition, *S. v. Culp*, 398.

Revocation for failure to pay child support, *S. v. Cash*, 677.

SWIMMING POOL

Dangerous horseplay of patrons, *Manganello v. Permastone, Inc.*, 696.

TAXATION

Failure to list property, *In re Appeal of Matthews*, 401.

TAXICAB DRIVER

Independent contractor in workmen's compensation case, *Alford v. Cab Co.*, 657.

TELEPHONE CALLS

By department store chain as unfair act in conduct of trade or commerce, *Edmisten v. Penney Co.*, 368.

TELEPHONE COMPANY

Prohibiting disclosure of information submitted to Attorney General, *In re Investigation by Attorney General*, 585.

TELEPHONE RATES

Claim for extended area service in rate case, *Utilities Comm. v. County of Harnett*, 24.

TENANTS BY ENTIRETY

Presumption that husband made gift to wife, *Brice v. Moore*, 365.

Statute constitutionality considered in pendente lite hearing, *Black v. Black*, 403.

TOBACCO HARVESTER

False advertising as compulsory counterclaim, *Manufacturing Co. v. Manufacturing Co.*, 97.

TRADE SECRETS

Prohibiting disclosure of modification of centrifuge, *Laboratories, Inc. v. Turner*, 686.

TRAILER

Required removal as banishment, *S. v. Culp*, 398.

TRUCK

Contract to repair, *Trucks, Inc. v. Bridges*, 355.

TRUSTS

Parol trust, evidence of promise after passage of title, *Wall v. Sneed*, 680.

TRUTH IN LENDING ACT

Counterclaim in creditor's action, *Construction Co. v. Gibson*, 385.

UNFAIR COMPETITION

Abusive telephone calls by department store, *Edmisten v. Penney Co.*, 368.

Prohibiting competitor's employment of former employee, *Laboratories, Inc. v. Turner*, 686.

UNFAIR COMPETITION — Continued

Prohibiting disclosure of centrifuge modification, *Laboratories, Inc. v. Turner*, 686.

UNIFORM COMMERCIAL CODE

Transfer of secured property, continuance of security interest, *Bank v. Construction Co.*, 220.

UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT

Blood grouping test for paternity, *Brondum v. Cox*, 35.

USURY

Service charge on account with plumbing supplier, *Supply, Inc. v. Allen*, 272.

UTILITIES COMMISSION

Availability charge disapproved by Commission, *Utilities Comm. v. Utility Co.*, 336.

Surcharge to recover fuel costs, *Utilities Comm. v. Edmisten, Atty. General*, 459.

VARIANCE

Between indictment and proof in escape case, *S. v. Eppley*, 217.

VENUE, MOTION TO CHANGE

Pretrial publicity, *S. v. Bryson*, 71; *S. v. Jackson*, 187.

Unsolved crimes, *S. v. Bryson*, 71.

VERDICT

Instructions on recommendations for mercy, *S. v. Jordan*, 529.

Not guilty, right of State to appeal, *S. v. Gilbert*, 130.

Reduction by court, *Redevelopment Comm. v. Holman*, 395.

VOLUNTARY DISMISSAL

Disposition of funds held by clerk, *Caroon v. Eubank*, 244.

WARRANTY

Manufacturer's liability for roasted nuts, *Coffer v. Standard Brands*, 134.

WINDSTORM INSURANCE

Tie-down discount for mobile homes, *Insurance Co. v. Ingram*, 741.

WITNESSES

Deceased witness, transcript of testimony at former trial, *S. v. Jackson*, 187.

Limitation on out of state witnesses, *S. v. Jackson*, 187.

Names furnished defendant, *S. v. Hamrick*, 143.

Written statements read by witness to refresh memory, *S. v. Greene*, 507.

WORK RELEASE

Failure of prisoner to return to prison, *S. v. Eppley*, 217.

WORKMEN'S COMPENSATION

Accident caused by intoxication, *Inscoe v. Industries, Inc.*, 1.

Back injury while lifting refrigerator, *Pulley v. Association*, 95.

Death of shoe store employee after kidnapping in parking lot, *Gallimore v. Marilyn's Shoes*, 628.

Laboratory assistant trainee as hospital apprentice employee, *Wright v. Hospital*, 91.

No change of condition, no additional recovery, *Shuler v. Talon Div. of Textron*, 570.

Remand of rate proceeding, *Comr. of Insurance v. Rating and Inspection Bureau*, 332.

WORKMEN'S COMPENSATION — Continued

Taxicab driver as independent contractor, *Alford v. Cab Co.*, 657.

WRITTEN STATEMENTS

Directing witness to read out of jury's presence, *S. v. Greene*, 507.

WRONGFUL DEATH

Doctor's treatment of child with appendicitis, *Spillman v. Hospital*, 406.

WRONGFUL DEATH — Continued

Guilty plea to murder, *Boone v. Fuller*, 107.

Instruction on nominal damages improper, *Lentz v. Gardin*, 379.

Pedestrian's contributory negligence, *Thornton v. Cartwright*, 674.

ZONING ORDINANCE

Operation of children's treatment center as permitted use, *Town of Southern Pines v. Mohr*, 342.

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